#### UNITED STATES COURT OF AREALS

FOR THE CITY

LAHAINA-MAUI CORPORTION, California corporation,

Appellant,

V.

TPH TAU TET HEW and HILEN IONA HEW, husband and wife, DRGE TAN and SHIZUKO RUTH , husband and wife,

Appellecs.

No. 20419

#### APPELLING CEPTY - Tex

## FILED

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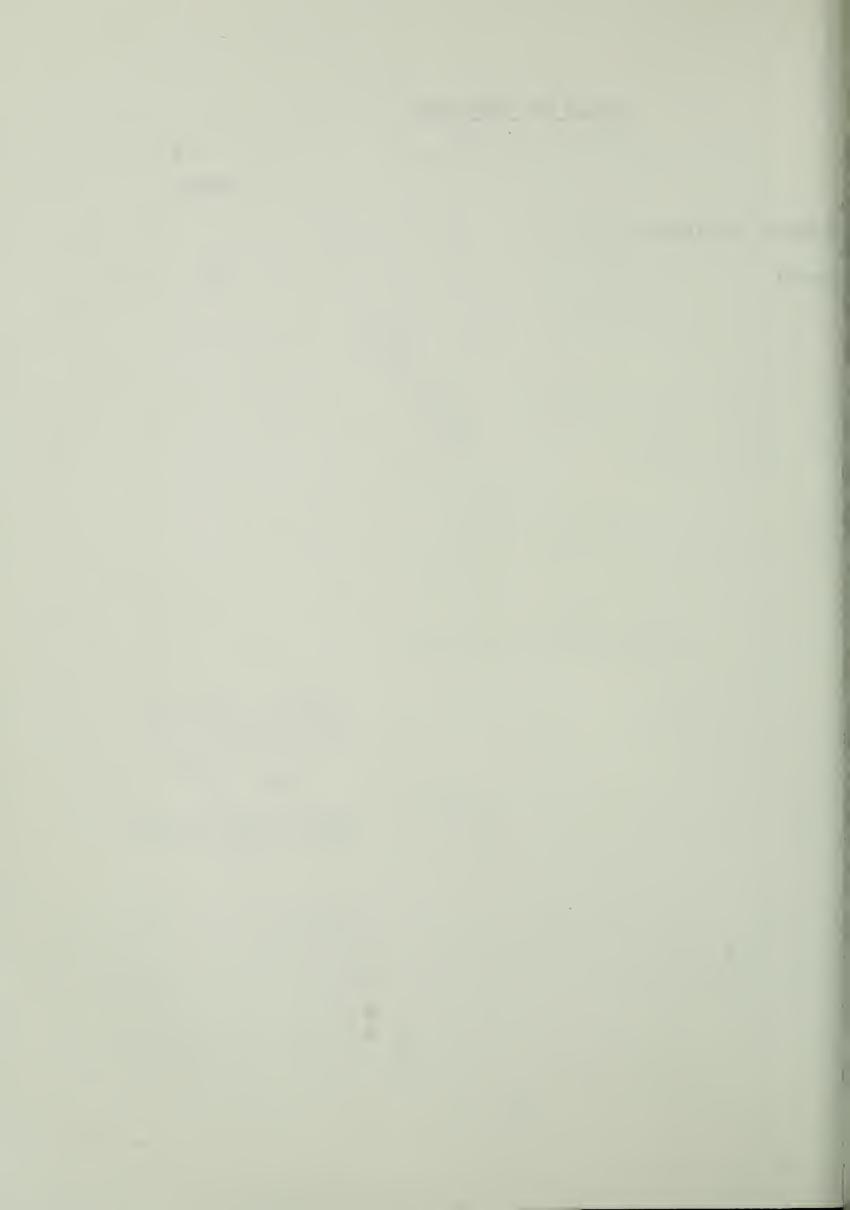
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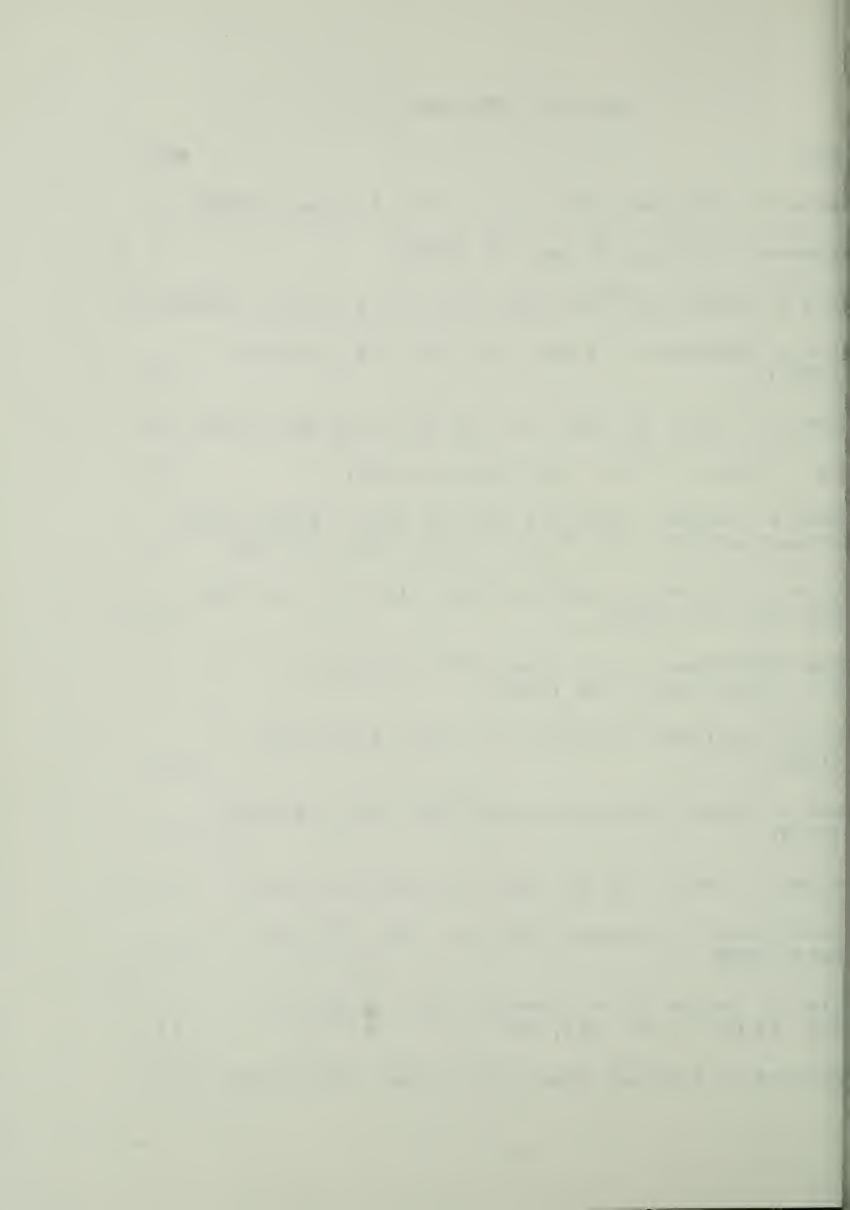
### TABLE OF CONTENTS

	Page
itement of Facts	1
gument .	5

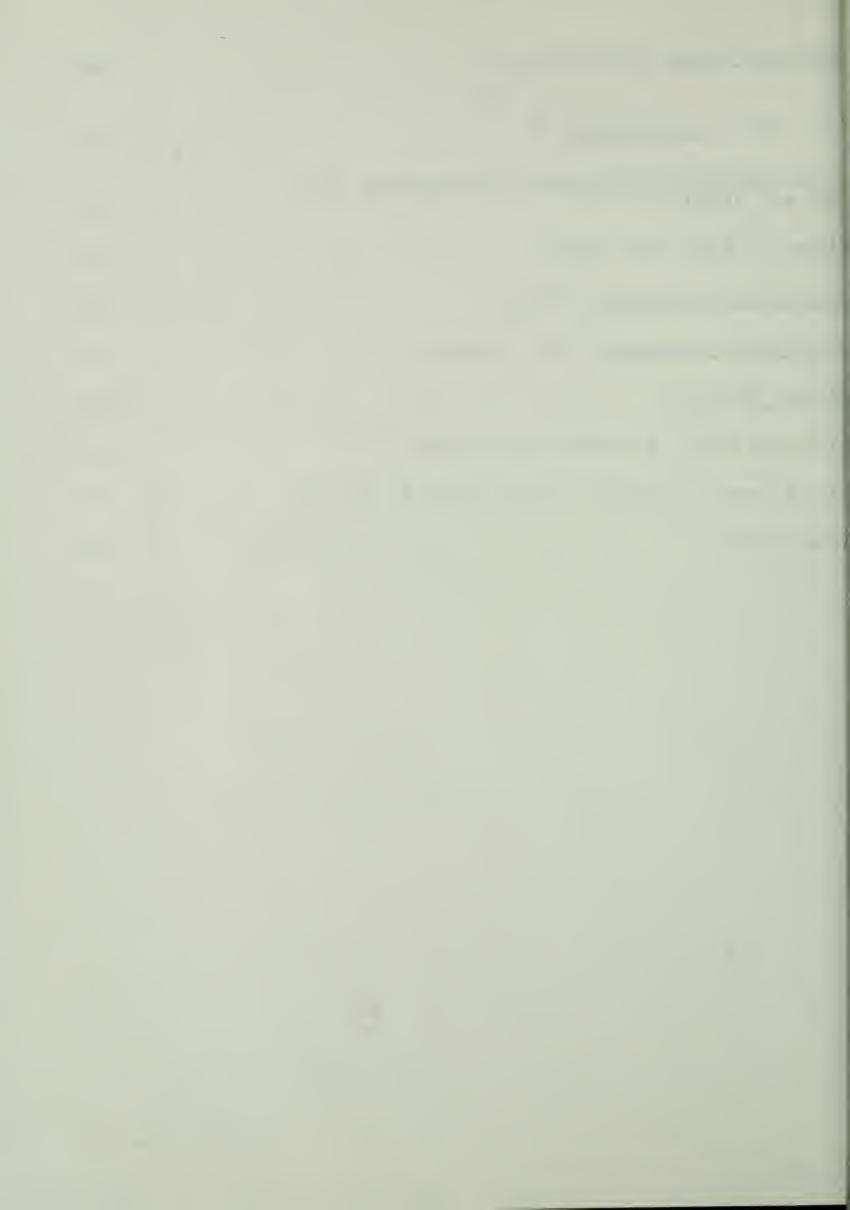


#### INDEX OF CITATIONS

ises:	Page
anton v. Williams, 209 Ga. 16, 70 S.E.2d 461 (1952)	19
ancone v. McClay, 41 Haw. 72 (1955)	5, 6, 15
ould v. Callan, 127 Cal. App. 2d 1, 273 P.2d 93 (195	4) 13
ire v. Patterson, 63 Wash. 2d 282, 386 P.2d 953 (1963)	18
bbell v. Ward, 40 Wash. 2d 779, 246 P.2d 468 (1952)	18
ng v. Davis, 137 Fed. 222 (Va.Cir.1905)	28
rusky v. Berger, 225 N.Y.S. 2d 797 (S.Ct. 1962) aff'd without opinion, 249 N.Y.S. 2d 858 (App.Div.1964)	
vine v. LaFayette Building Corp., 103 N.J. Eq. 121, 142 Atl. 441 (1928)	18, 19
gna Development Co. v. Reed, 228 Cal.App. 2d 230, 39 Cal.Rptr. 284 (1964)	20
rris v. Ballard, 56 App. D.C. 383, 16 F.2d 175 (1926)	23
ven v. Miller, 168 Cal.App.2d 391, 335 P.2d 1035 (1959)	20
otter v. Lewis, 185 Md. 528, 45 A.2d 329 (1946)	18, 19
ited States v. Johnson, 319 U.S. 307, 87 L.Ed 1413 (1943)	29
sley N. Taylor Co. v. Russell, 194 Cal.App. 2d 816, 15 Cal. Rptr. 357, 365	23
dehouse v. Hawaiian Trust Co., 32 Haw. 835 (1933)	14



reatises, Texts & Periodicals	Page
N.O.	
4 Am. Jur. <u>Lis Pendens</u> §2	27
(3d ed. 1884)	23
Harv. L.Rev. 731 (1912)	19
estatement, Contracts §359(2)	19
estatement, Contracts §370, Comment C	6
tatutes & Rules	Page
alifornia Civil Procedure Code 580b	13
evised Laws of Hawaii (1955) §230-42, 342-78	28
9 USC 81 06/	28



# UNITED STATES COULT OF APPLIES FOR THE NINTE CIRCUIT

E LAHAINA-MAUI CORPORTION, California corporation,

Appellant,

V.

.0. \_ /

TE H TAU TET HEW and H'L'N CION HEW, husband and wife, CRGE TAN and SHIZUKO RUTH N, husband and wife,

Appellees.

#### APPELLING'S TO VOLTE

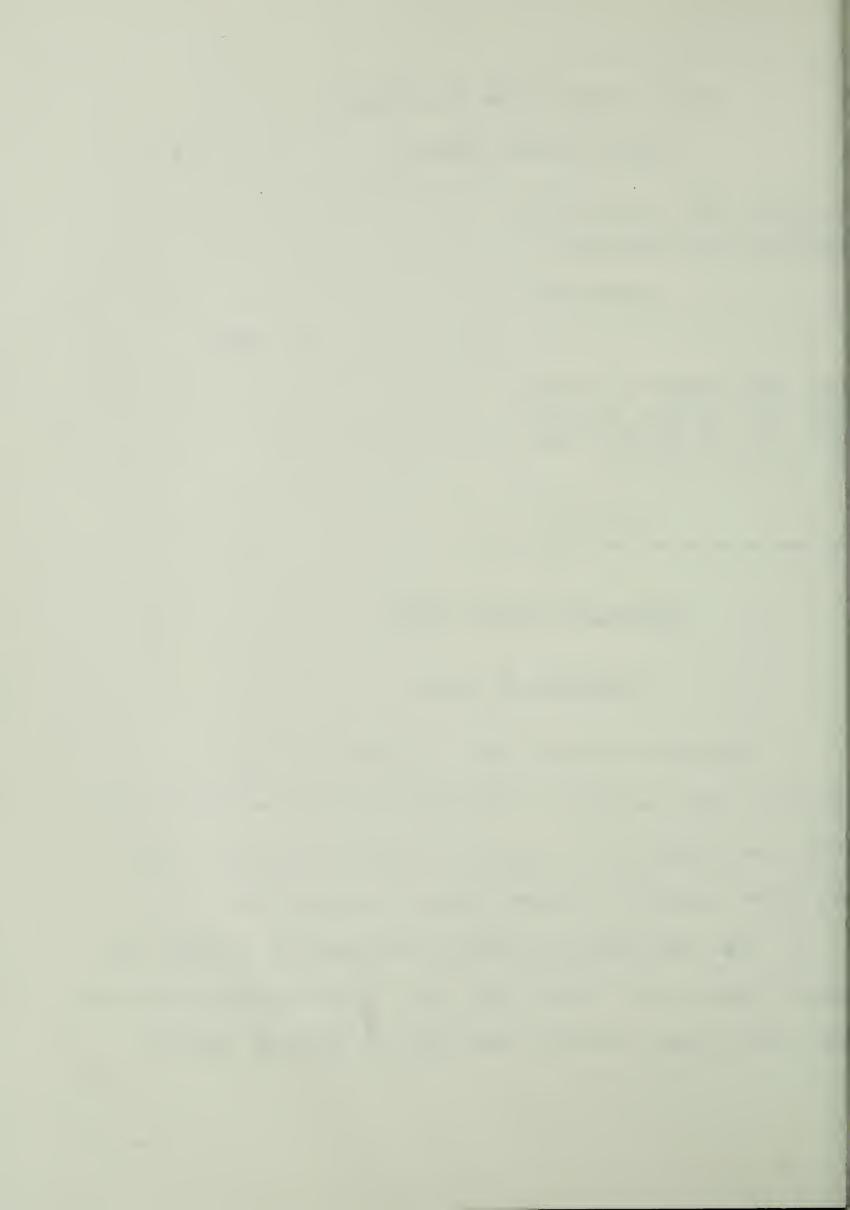
#### ST. Table Of

Appellees entered into an open to lease to cellants; upon exercise of that of the open.

Florm and brought this action to centeel the open.

Ourt below granted a summary judgment to head lee.

The sole question before this court is made a series of the court when the court will be a series of the court when the court will be a series of the court

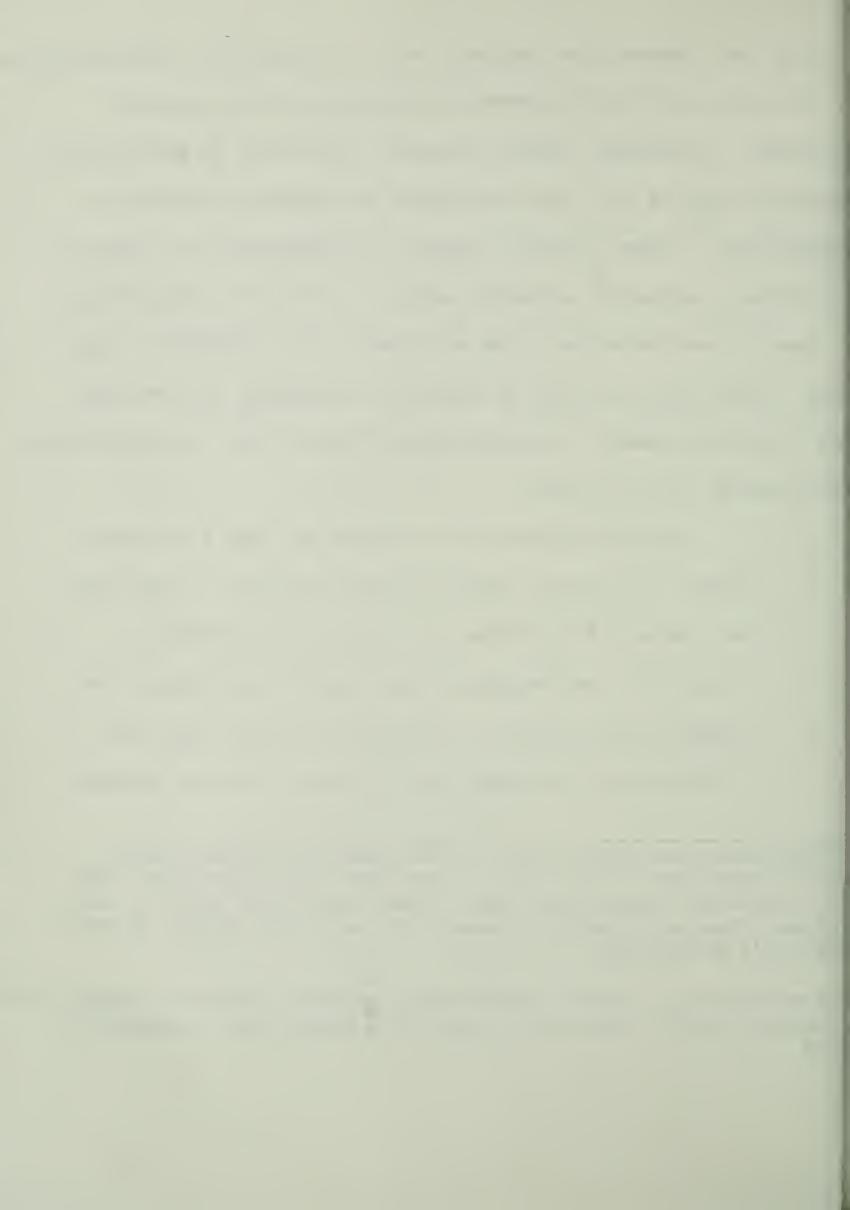


recrial fact between the parties, and in making such a determination of "Statement of Facts" given by the parties is of singular aportance. Appellees' "Facts" contain references to self-serving atements made by the Appellees which are nowhere acceded in 1/2. Appellant. Some of their "facts" are immaterial to a decision 2/2 as summary judgment and serve only to confuse the facts which we open to consideration. Two statements, one of which is not fact at all and the other an incorrect statement of the lower ourt's holding, deserve specific mention since they might otherwise misleading to this court:

Appellees make the statement at page 3 of their brief: "A proper subordination rovision in the lease was basic and essential to enable the Appellant to obtain for the benefit of both lessor and lessee the proper financing for a proposed 2-3 story, 200 unit 'combination apartment hotel' project costing between

<sup>&</sup>quot;Appellees, not experienced in the leasing of real property 1:92)" (Appellees' Brief 2-3); "Appellees understood that this ant prevented, during the term of the 'exclusive option,' the pellees from negotiating a lease with any other person (R:8')" appellee's Brief 2-3)

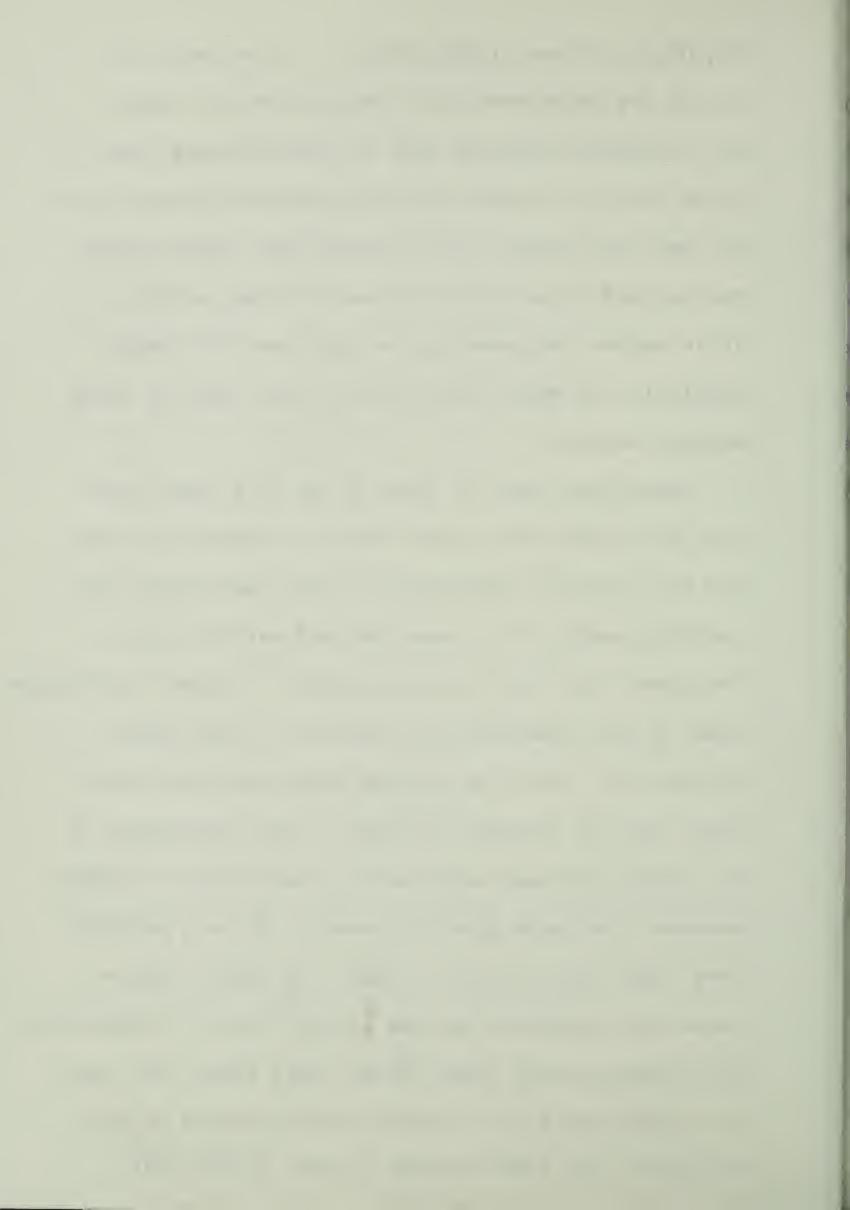
See footnote labove. Additional examples: "were not represented counsel (R:80)" (Appellee's Brief 3); second full paragraph, age 4.



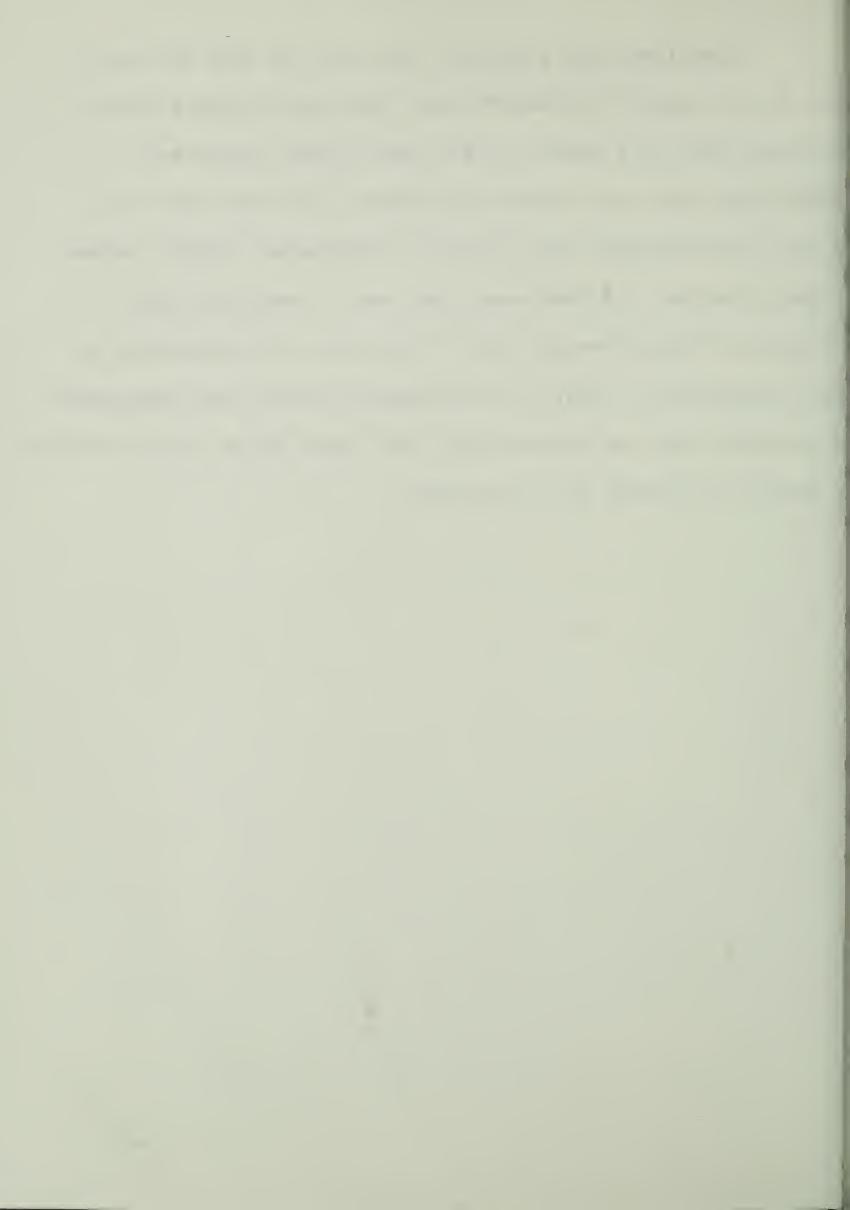
\$1,000,000.00 and \$1,500,000.00." At no point in any of the references given by Appellees is there any indication whatever that the subordination was to be for the "benefit of both lessor and lessee"; nor is there any portion of the record that would permit the inference that this statement is fact at all.

It is rather the assertion by Appellees of a legal conclusion on which the outcome of this case in large measure depends.

Appellees state at pages 2 and 6 of their brief that the court below ruled "that no contract to lease had been entered into because of the uncertainty and indefiniteness of its essential and material terms." The lower court made no such ruling; it found "indefiniteness" in the subordination provision of the option (R:105,115), but it at no time found that this meant there was "no contract to lease." This conclusion is one which Appellees urged on the court below - without success - and urge upon this court. It is a position they take, but it is not a fact. It should also be noted that Appellees use the plural "terms" in describing the indefiniteness found by the court below; the court was quite specific in finding indefiniteness in only one term - the subordination clause. (R:105,115).



Appellees make a further reference to what the court clow did at page 10 of their brief; they say the court below oncluded that as a matter of law the alleged option was sufficient under the Statute of Frauds." If they mean that we court specifically came to such a conclusion, their statement simply untrue. If they mean that such a conclusion must be cessarily follow from the court's decision, the statement is rely misleading in that it indicates the court below supported we argument they are introducing. The court below did not mention the Statute of Frauds in its holding.



#### ARGUMENT

Appellees' arguments tend at times to go in many rections and to be not clearly related to the issues in this se. To avoid confusion Appellant will reply to these arguments thin the framework of the issues presented. These are not implicated. The case concerns an option to lease land belonging appellees which Appellant has exercised. Appellees have fused to perform and have been awarded a summary judgment in the eir action to declare the option void. The award of this immary judgment is being appealed here by Appellant.

The District Court ruled that the option was, in all spects save only one, specifically enforceable under Hawaii w by virtue of the case of Francone v. McClay, 41 Haw. 72 (1955), case granting specific enforcement of an option to lease almost entical to the one here. There is, however, one clause in our tion which did not appear in that case, it being the underlined rtion of the following paragraph:

Said lease shall contain the standard provisions normally contained in a lease for similar property situate in the State of Hawaii together with the provision that the lessors shall subordinate their



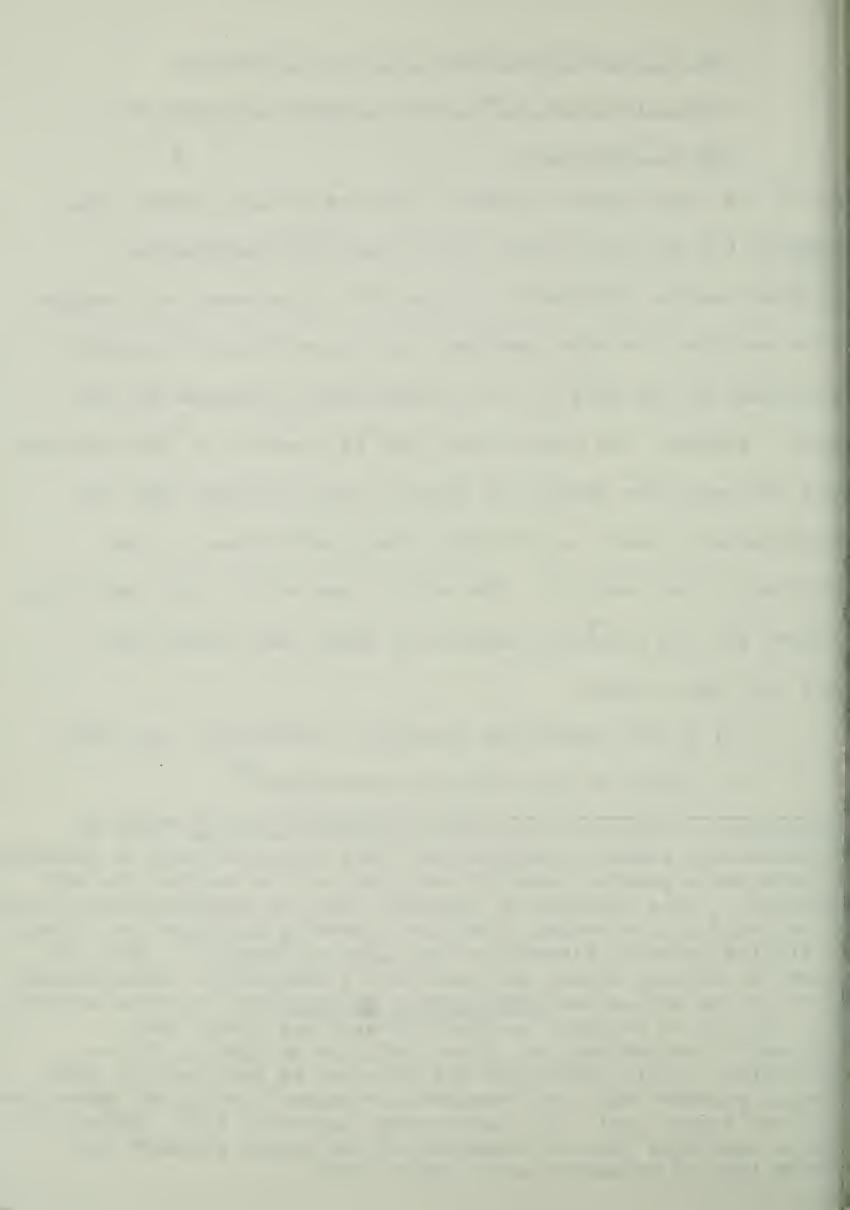
fee to permit the lessee to obtain financing which provision is by way of example, but not by way of limitation.

nis is the only respect in which the case at hand differs from

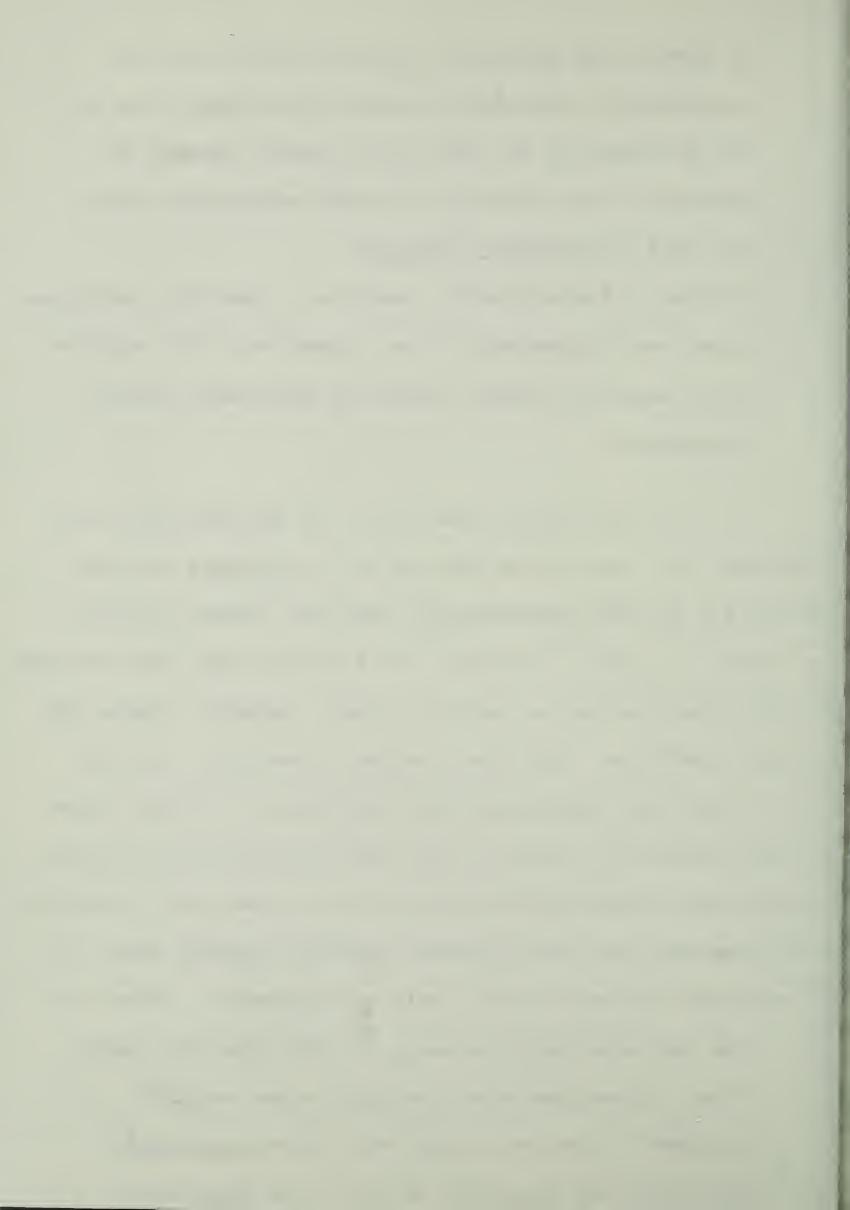
covision was too indefinite for specific enforcement as a matter and that therefor Appellant was not entitled to specific inforcement of any part of its contract nor to damages for its ceach. Further, the court ruled that as a matter of law Appellant ould not waive the benefit to which it was entitled under the abordination clause, and thereby obtain enforcement of the emainder of the contract. The entire case before this court thus avolves the one provision underlined above and nothing more.

1) Is the underlined provision "indefinite" such that  $\frac{3}{}$  it cannot be specifically enforceable?

Appellees at page 16 state their position as being "that on me motion for summary judgment the court below had only to consider there was a genuine issue of material fact on whether the subscitionation clause tendered by Appellant (or any subordination clause) as or could be a standard provision 'normally contained in a lease or similar property situate in the State of Hawaii.'" This, of purse, is clearly wrong; the question is whether the subordination lause in the option was sufficiently definite for specific enforcement. It can be definite in itself (which has always been opellant's contention), or if not definite in itself, it can evertheless attain sufficient definiteness by reference to some external standard such as "standard provisions" (which has never been opellant's position). See Restatement Contracts \$370, Comment C. Exhaps Appellees' misunderstanding of the issues explains the seeming lack of organization in their brief.



- 2) Even if the provision should be found to be not specifically enforceable because "indefinite," can it not be waived by the Appellant, thereby leaving the balance of the option specifically enforceable under the rule of Francone v. McClay?
- 3) Even if the option is incapable of specific performance under any circumstance, is not Appellant still entitled to an award of damages because of Appellees' refusal to perform?
- I. As to the first issue (i.e., Is the provision which stinguishes this option from the one in the Francone case too definite for specific performance), Appellant showed in detail at length at pages 11 through 17 of its brief that the provision ing for subordination is perfectly clear, perfectly simple and no wise indefinite. Appellant further showed that a ruling at such clause was indefinite would constitute a judicial interence with freedom to contract which was contrary to all existing thorities and accepted jurisprudence of the common law. Appellees at this argument with many argument headings and many pages of the and, when the smoke clears, only two arguments. These are:
  - (a) The underlined language, say the Appellees, means
    "that a provision subordinating the fee would be
    included in the lease along with other nonstandard
    provisions not mentioned and yet to be negotiated."



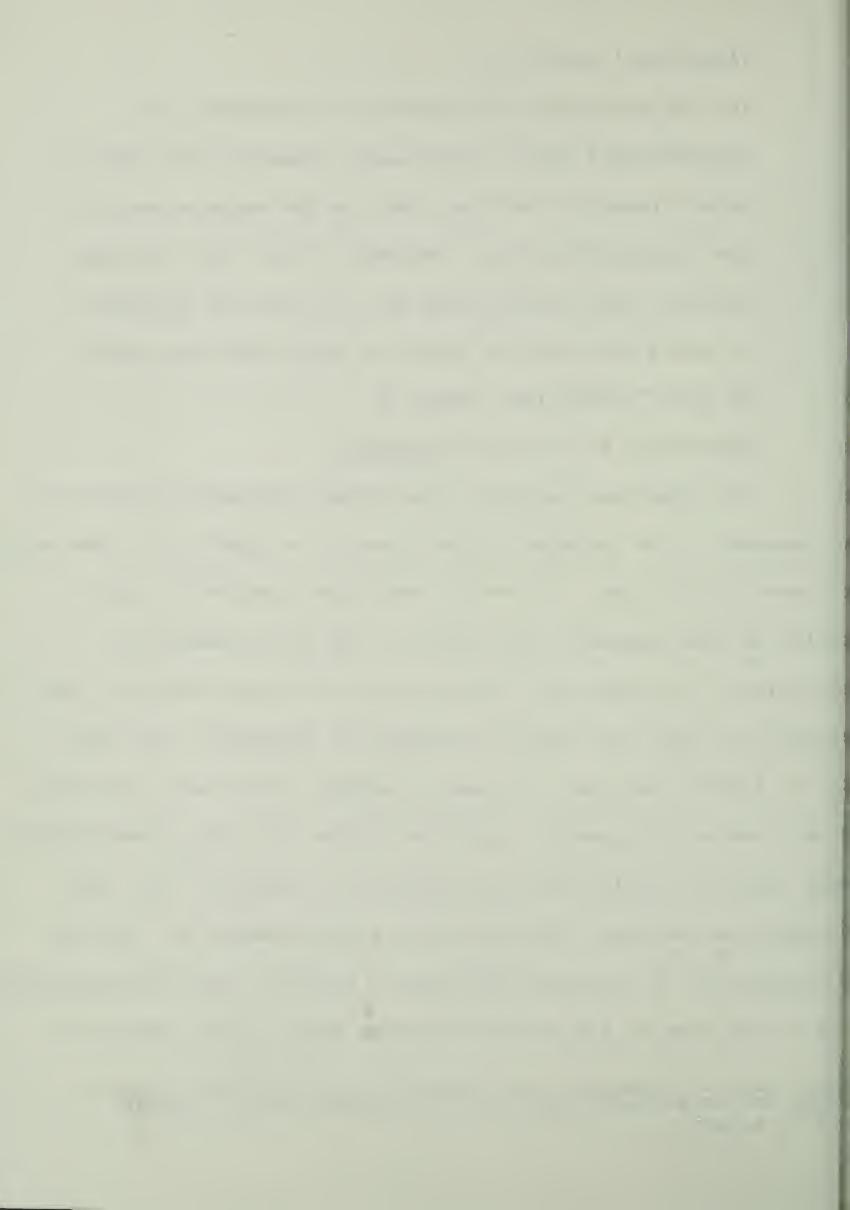
(Appellees' Brief 9).

(b) The subordination language is indefinite and unenforceable because "necessary elements of a subordination clause are omitted, such as the maximum amount of the construction loan, the terms of the loan including when the loan would become due, the rate of interest it would bear and the manner in which the loan would be paid." (Appellees' Brief 9)

These will be discussed seriatim:

(A) Appellees' argument that other nonstandard provisions be intended to be included in the lease is to Appellant's knowledge and new in this case. It was not mentioned insofar as can be called in oral argument nor raised in any of the memoranda led below. Certainly the interpretation was never adopted, even liquely, by the court below and Appellees apparently wish this part to affirm the grant of summary judgment below based upon this wand independent ground. Appellees state that this interpretation the "obvious meaning" of the provision in question, but they a surely not serious. The asked-for interpretation is anything to obvious; it is strained and unreal. Further, this "Interpretation" les in the face of the use of "together with" in the provision:

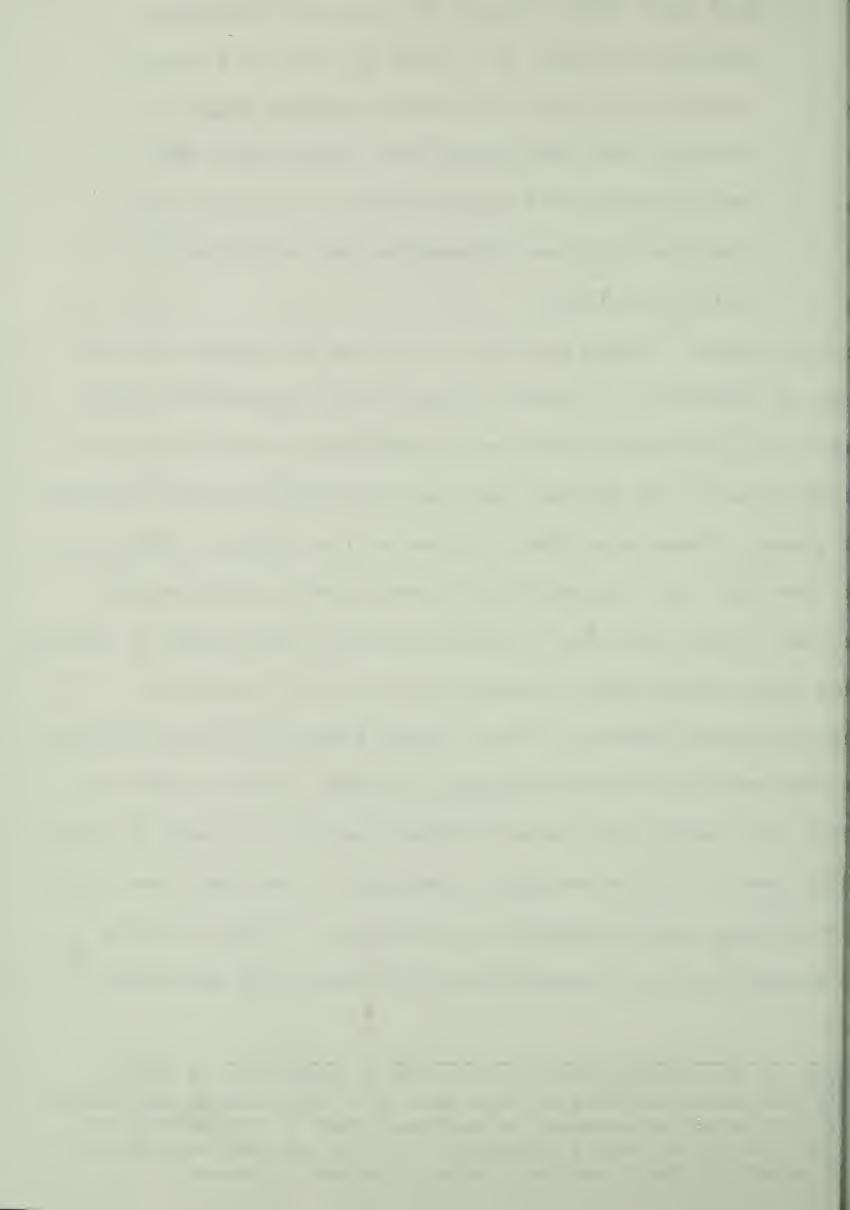
They do not explain why, if it is obvious, no one thought out it before.



Said lease shall contain the standard provisions normally contained in a lease for similar property situate in the State of Hawaii together with the provision that the Lessor shall subordinate their fee to permit the Lessee to obtain financing which provision is by way of example, but not by way of limitation. (R:9)

last clause - "which provision is by way of example, but not way of limitation" - clearly refers to the "provision" which cedes it. And that provision is definitely stated to be the exception to the proviso that the lease shall contain "standard visions." Nowhere is there any use of the plural or indication t more than the one specified "non-standard" provision was ended. Surely Appellee's "interpretation" would never be adopted any court merely from a reading of the words; rather its eptance would require a rather strong showing by parole evidence t this was the intention despite the words. But in order to vail on a motion for summary judgment as here, it must be found this court that the meaning of the words is so clear that parole dence would not be admitted to explain it. Such a finding h respect to this "interpretation" is simply not reasonable.

Even if the interpretation asked for by Appellant is valid, ely the provision does no more than give the parties permission arrange other nonstandard provisions later if they wished to. such case it is merely redundant, for the parties may always and or add to their contract later by mutual agreement.



(B) Appellees present a number of argument headings on e question of specific enforceability of the provision, but they 1 contain the same argument. One of these headings states that e option was insufficient under the Statute of Frauds because he subordination language was vague and indefinite." (Appellee's ief 10), Another is that "an option to lease which is incomplete d uncertain cannot be specifically performed." (Appellees' Brief 13) pellees do not indicate anything that is "incomplete and uncertain" out this option other than the alleged indefinitness of the bordination provision. Again: "as a matter of law, a subordination ovision requires agreement on the conditions of the subordination." ppellees' Brief 17) These conditions, it turns out, are the ecessary elements" which were not included in this case and ereby render the subordination clause indefinite (Appellees' ief 9,18). In short, all these headings introduce precisely e same argument -- that the subordination language is uncertain. this is the appropriate issue, then it ought to be discussed such and not obscured behind a number of confusing disguises. The provision "that the lessor shall subordinate their e to permit the lessee to obtain financing" surely is not

definite on its face. It describes fully and completely what

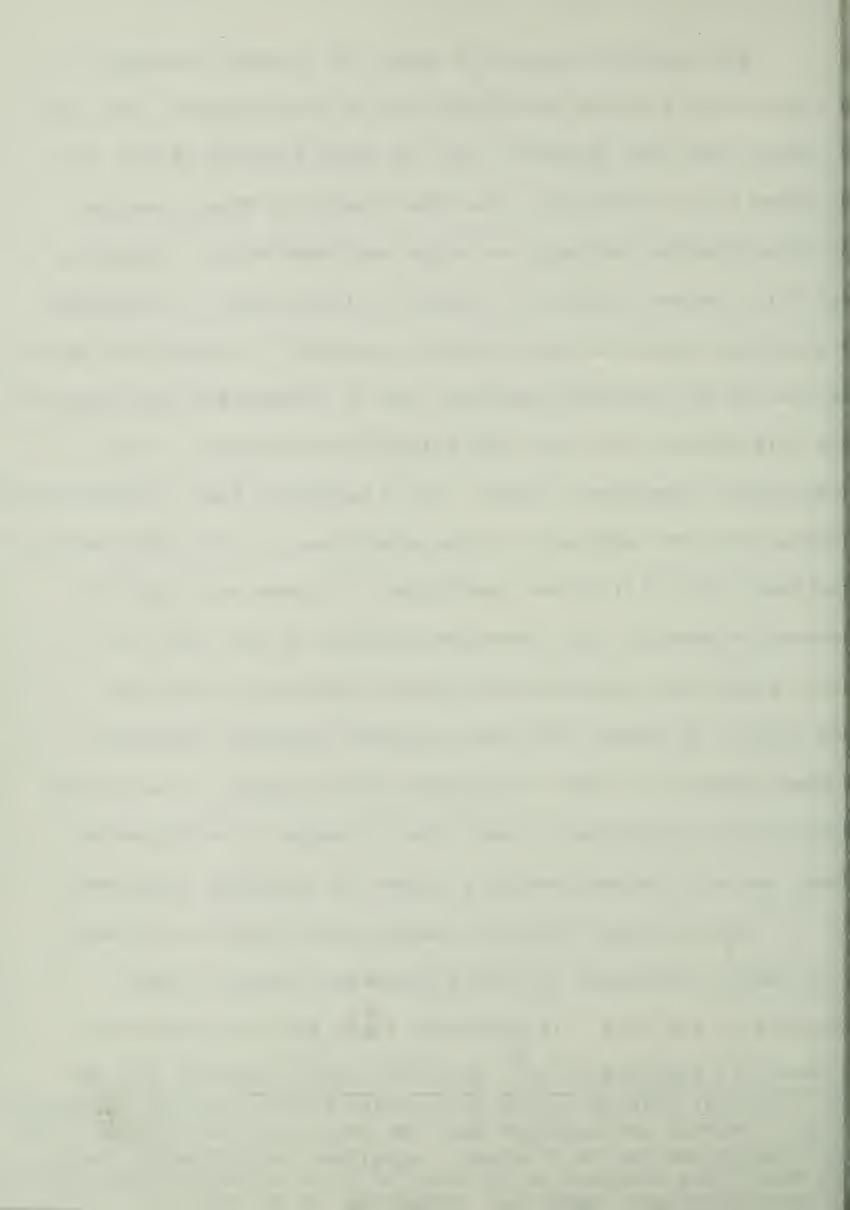
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ne lessor is required to do. Appellees argue, however, and the

As Appellant pointed out in its opening brief (page 13), it offered

supply experts to establish that the provision had a definite and

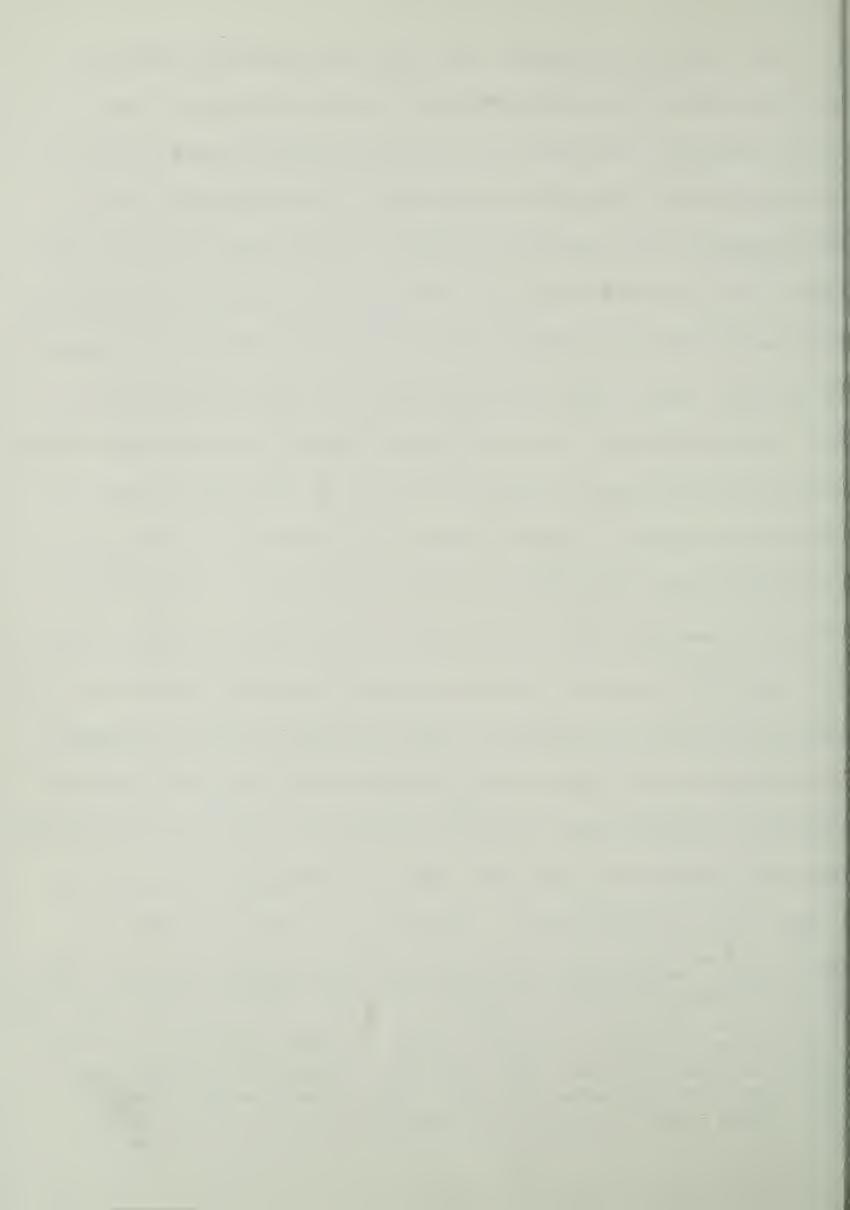
scertainable meaning as it stood. Appellees recognized in their

cief that "this amounted to an offer of proof of facts which precludes to entry of summary judgment." (Appellees' Brief 18)



wer court apparently agreed, that any subordination clause in der to be effective as an agreement between two parties must ntain "necessary elements" including the maximum amount of the nstruction loan, the terms of the loan, including when the loan uld become due, the rate of interest it would bear, and the manner which the loan would be paid. But there is no explanation of why se elements must be present, and no hint as to why a party cannot, he wishes, simply agree to subordinate his fee to whatever tent may be necessary in order for the lessee to obtain financing. Appellant points out at pages 15 and 16 of its brief, there is difference except in degree between an agreement to subordinate mpletely as here, or subject to any combination of restrictions ecessary elements"), or not at all. It is truly an unusual rule law which (1) permits a party who agreed to fully subordinate his terest in a piece of property, simply because of that agreement, avoid not only his obligation to subordinate but also all other ligations he might have incurred at the same time, but (2) requires party who agreed to a less-than-full subordination to comply in ll with all his obligations. Appellant is unable to find one

Even though he may have received full compensation and the other rty was always prepared to perform in full. In this case Appellant id Appellees the sum of \$1,000 for the option which had a life of ly slightly in excess of three months (R:8-9); Appellant is also epared to show at trial that the rental agreed to by Appellant is in excess of the value the land should have brought under a gular lease when the option was entered into.



angle logical justification for this rule suggested by Appellees.

e justification given by Appellees is as follows: They say

Appellant's contention that the provision is clear and definite

"absurd"; and (2) that Appellant can only be correct if the

bordination provision was one of the "'standard' clauses

attracted for." (Appellees' Brief 18) The first statement is not

atement is simply nonsense. No contention has ever been made

at the subordination provision is a "standard" clause; the con
nation is simply that as it is written it is clear, definite and

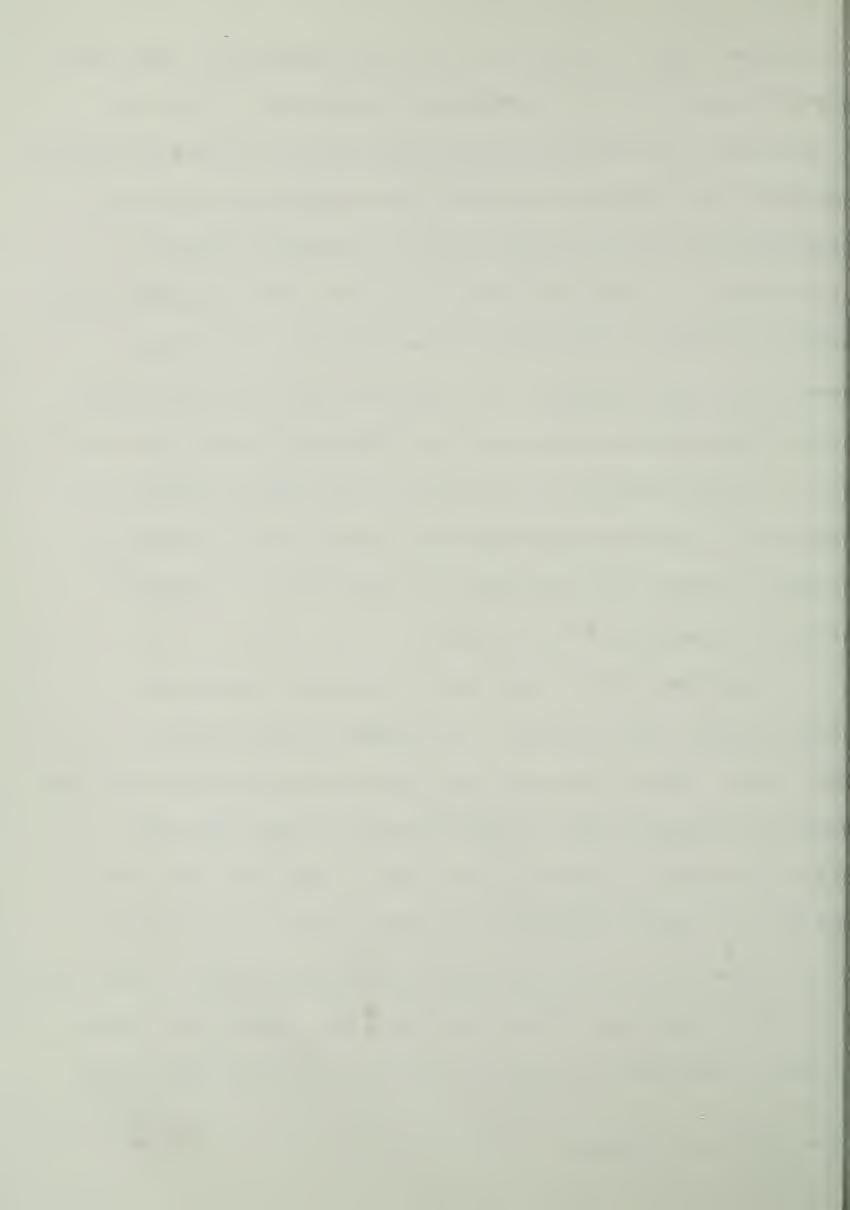
forceable. A search of Appellees' brief for any further

asoning to support the conclusion it asks for or to answer

pellant's argument will be in vain.

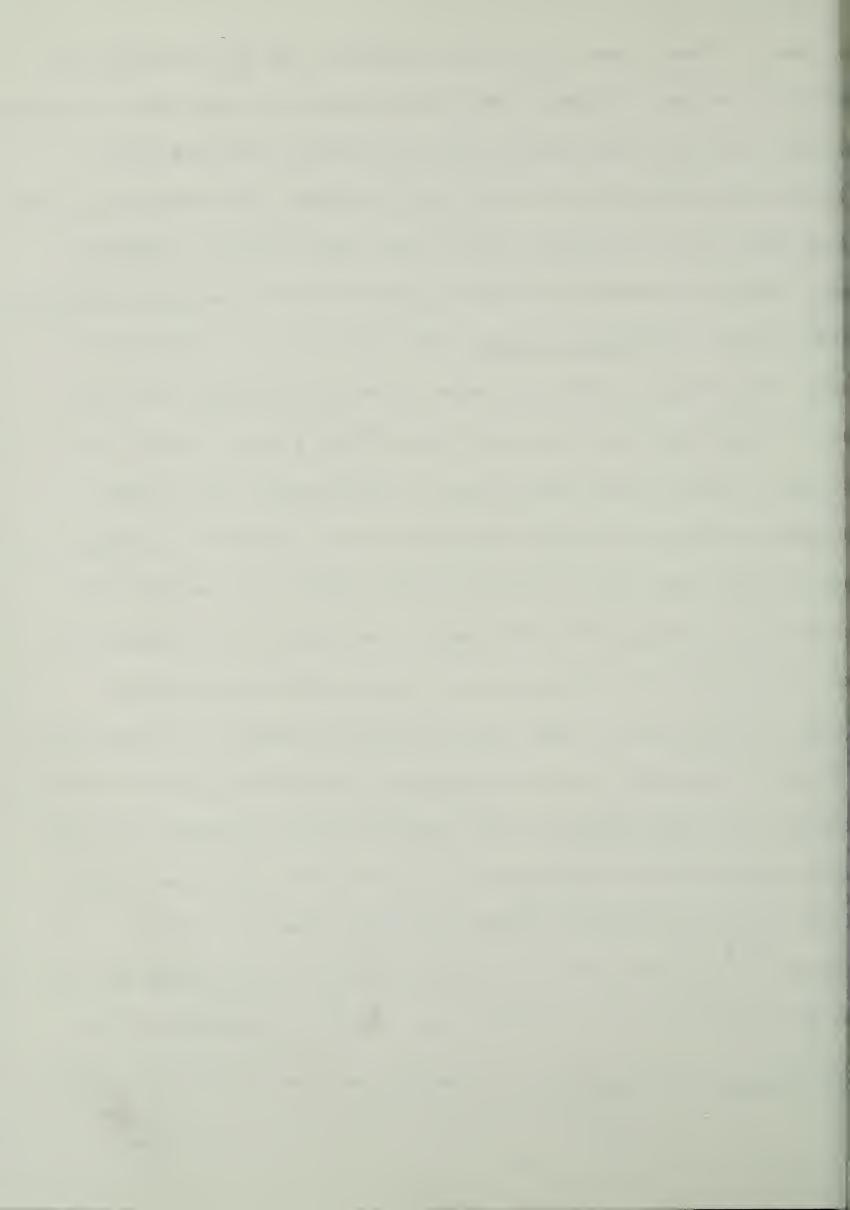
Appellees simply rest their case upon a series of lifornia cases, none of which was decided by that state's preme Court. These cases are laid out and discussed by Appellees pages 20 through 27 and do unquestionably assert that the called "necessary elements" asked for by Appellees must be ated in full detail alongside any subordination provision in der to render that provision specifically enforceable in California at is their reasoning? What logic have they found that meither pellees or Appellant in this case are able to find? The answer

See footnote 3, supra.



: none. These cases constitute authority for the instant case hich is governed by Hawaii law) only insofar as they are persuasive; ey are not only unpersuasive, they are wholly devoid of any gical explanation for the rule they espouse. As Appellant pointed t at page 16 of its brief, all of the cases cited by Appellees rely follow without reasoning or explanation the equally unreasoned iter dictum in Gould v. Callan, 127 Cal.Ap. 2d 1, 273 P.2d 93 954) which they incorrectly refer to as the "holding" of that se. As Appellant has indicated (Appellant's Brief 16-17) the cision in these cases constitutes a substantial and a unique terference with the rights of parties to a contract to bargain and ree to what they will. Such an action cannot be justified by ference to principles of the common law since it is contrary to em, and in fact the decisions are purely and simply policy cisions to the effect that unrestricted agreements to subordinate ll not be enforced. Only one possible explanation can be found. California the legislature has decided that purchasers of land ving purchase money mortgages as a part of the purchase price y not be held personally liable for the payment of such rtgages. In other words, a seller of land is prohibited by law om bargaining for and obtaining the personal liability of his

California Civil Procedure Code §580(b).

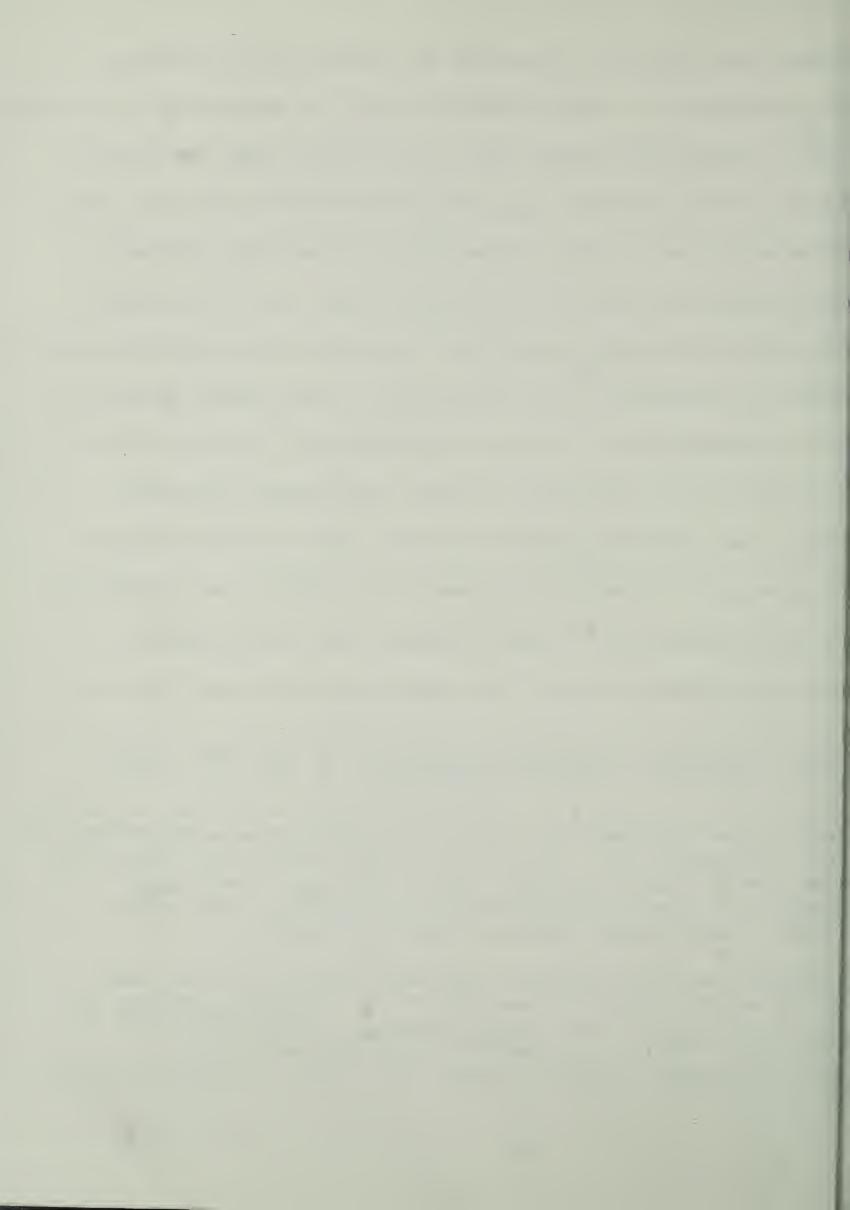


rchaser and can have no security for payment of the balance his purchase price other than the land. In Hawaii, as in most other ates, a seller can bargain for, if he wishes, both the personal ability of the purchaser and the land as his security; he could, he were willing to rely on the personal liability, allow a mplete subordination of his interest in the land - or indeed mply take no mortgage on the land - and not be left without some surance of repayment. In California, if the seller agrees to a mplete subordination, the law forces him into a position where has given up all security. Perhaps this unique situation stifies the extremely unusual position taken by the California wer appellate courts, but it seems more likely that the Supreme urt of California will refuse to adopt the position when the portunity presents itself. The important point here, however,

<sup>/</sup> E.g., Wodehouse v. Hawaiian Trust Co., 32 Haw. 835 (1933).

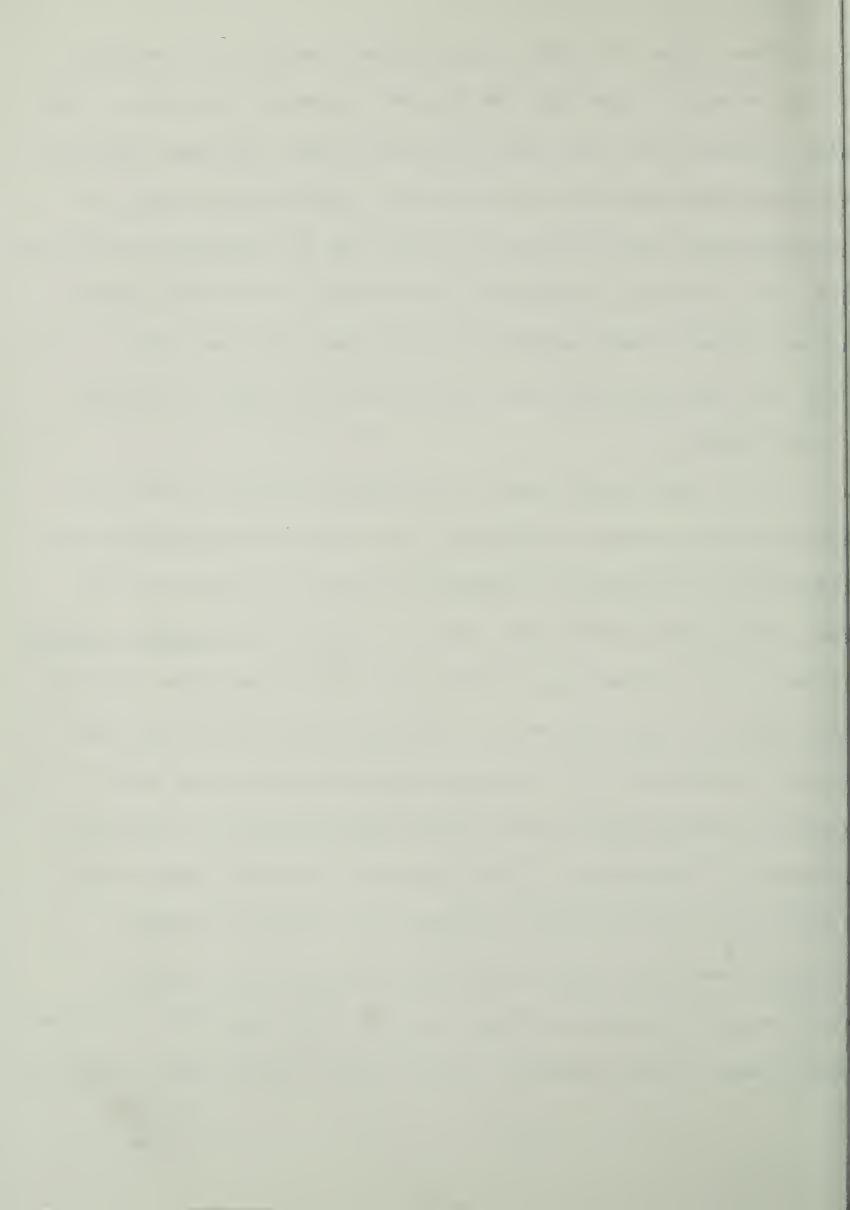
<sup>/</sup> Surely no one would ever assert that a seller of land would not bound by an agreement to sell land for cash plus a promissory note to mortgage at all. An opposite result should not follow from situation in which the seller takes cash plus a note plus a rtgage, but agrees to subordinate his mortgage. The latter sition is not legally different from the former.

<sup>/</sup> One case outside California has been decided to this same fect in a trial court in New York State. Krusky v. Berger, 225 Y.S. 2d 797 (S.Ct. 1962), aff'd without opinion, 249 N.Y.S. 2d 8 (App.Div. 1964). It offered no reasoning or analysis, wever, and merely adopted blindly the holding of these California ses.



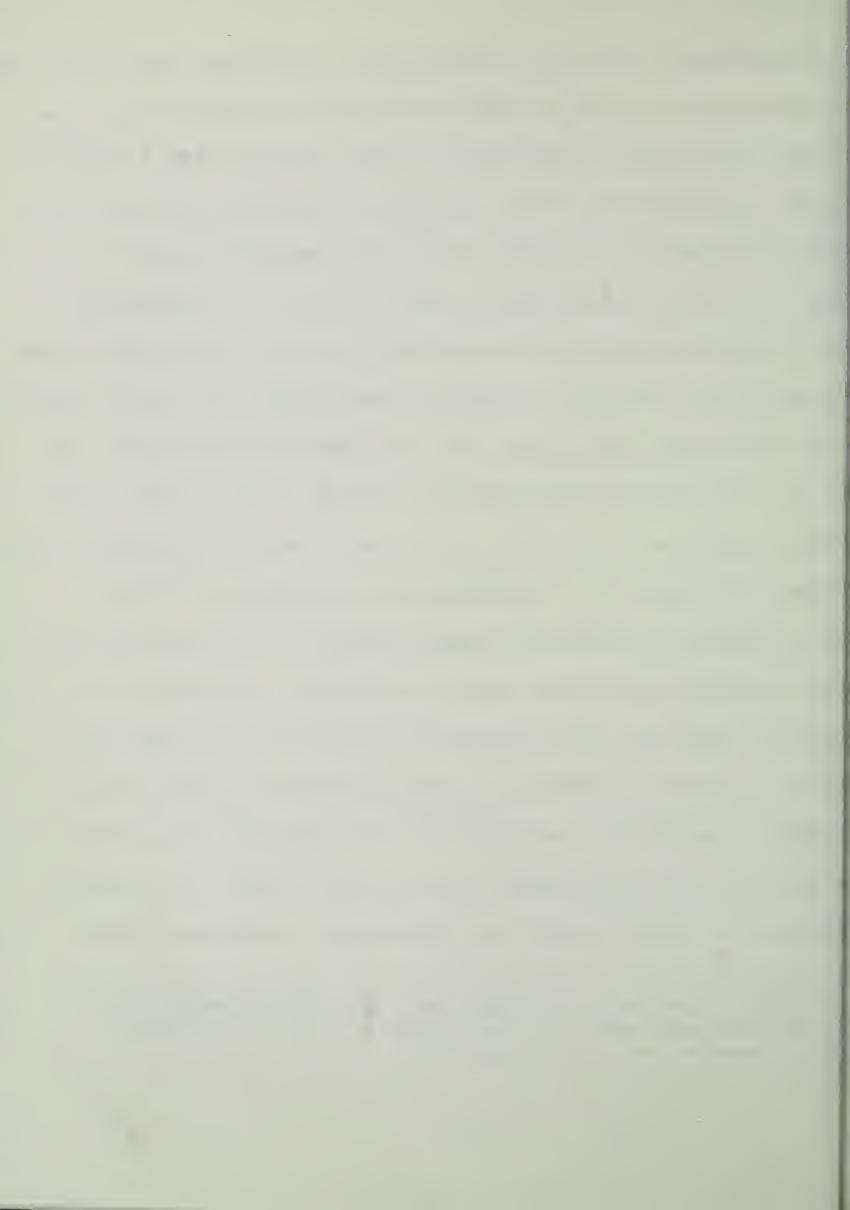
that these cases are wholly unsupportable unless on the ground nat they produce a special rule to meet a special situation. This pecial situation does not exist in Hawaii where personal liability in purchase money mortgages is the rule, and the cases offer no ther persuasive justification for their use as authority to determine awaii law. In short, Appellees' brief merely reiterates these ases and repeats their holding. It does not, and the cases not, meet the arguments made by Appellant at pages 11 through in its brief.

II. The second issue is whether the subordination prosion cannot be waived by Appelant, even though it itself may not specifically enforceable, thereby leaving the balance of the tion specifically enforceable under the rule of Francone v. McClay. pellant, in its brief (pp. 18-32) cited and quoted from numerous thorities in a large variety of jurisdictions establishing the le that a provision in a contract may be waived by the party titled to the benefit thereof thereby entitling him to specific forcement of the balance of the contract. Many of these cases e elaborately and carefully reasoned; all of them involve a intractual provision which could not be specifically enforced or one reason or another and the courts granted specific performance the balance of the contract. Every one of these cases constitutes



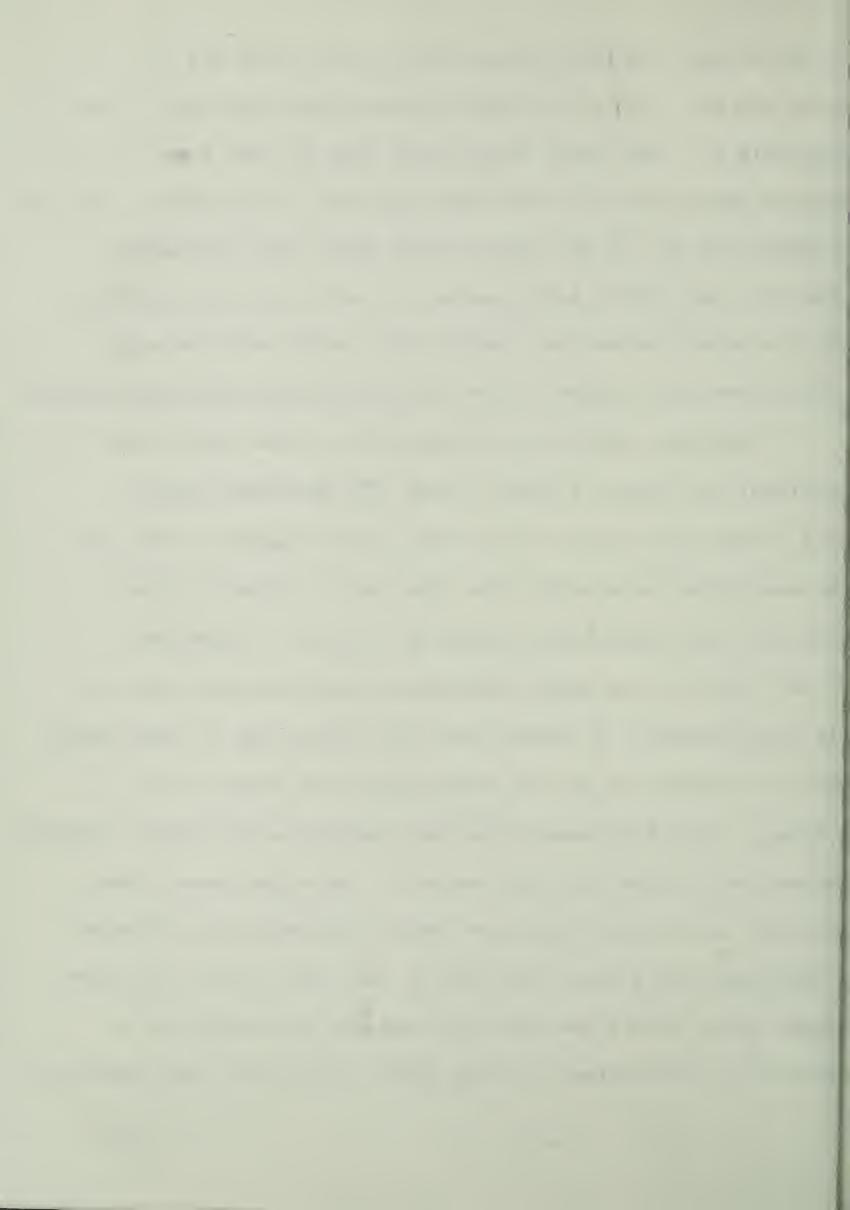
distinguishable authority for Appellant's contention that waiver of e subordination clause in this case was perfectly proper and that ecific performance of the balance of the contract should have been anted. Appellees' brief does contain a discussion of these cases, ough its thrust is not always clear. For example, a name is atched to a group of Appellant's cases, ('Waiver of Performance ses"), and then they are distinguished from our case on the followg ground: the contracts involved in these cases are "valid, binding d certain in all their terms, the only problem being whether the rms are specifically enforceable or whether equity is the proper medy." (Appellee's Brief 34). It is by no means clear why this conitutes a distinction and Appellees do not elucidate. These ses segregated by Appellees simply involve a provision which is t specifically enforceable for a reason other than that it is definite. But this is a distinction without a difference for ere is no material difference between provisions which are not ecifically enforceable because they are indefinite and provisons which are not enforceable for any other reason. The importit factor is that in each case there was a provision which

Probably Appellees do no more here than reiterate the same gument they make over and over - that our case is different cause, somehow, we have no contract.

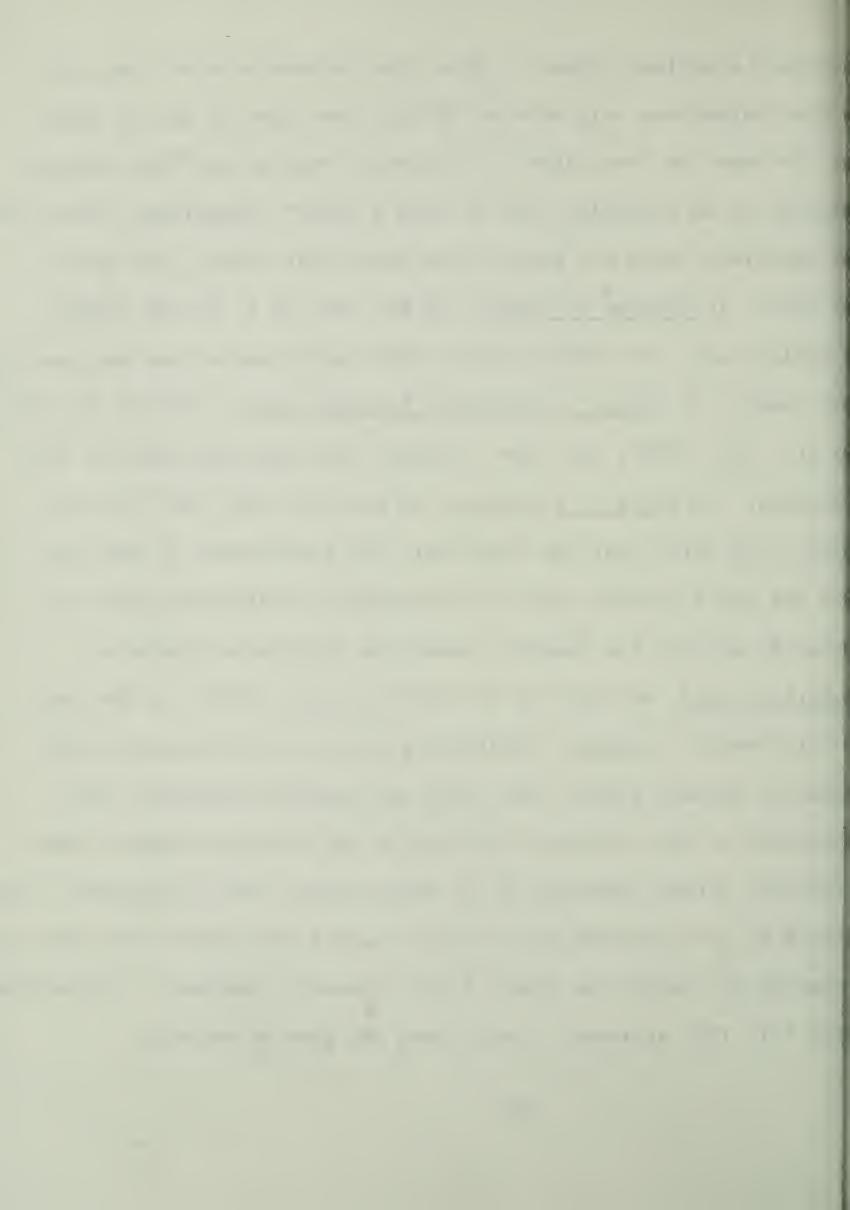


itract was sp ically enforced without that provision. This precisely w the court should have done in this case. It perhaps appropriate to note that Appellees' "distinction" has not an adopted by any of the other courts which have considered matter; there are a large number of cases cited by Appellant which a provision was not specifically enforceable because definite yet the balance of the contract was specifically enforced.

Appellees then form another group of the cases cited Appellant and attach a name to them (The Deferred Payment es"). They state that "in all the deferred payment cases the ver was either made within the time period allowed in the tract or the contract was silent as to time." (Appellees' ef 34) It is by no means clear what this statement means or it was inserted. It cannot mean that there was a "time period owed" for waiver in any of these cases, for there was no th thing. Appellant cannot find any content in the words "contract silent as to time! in this context. One might guess, from iding that portion of Appellees' brief following the statement it what was really meant was that in the cases cited the waiver taken place before the time for exercise of the option or eptance of the contract or that there was no such time specified.



rtainly Appellees appear to give this impression when they point that waiver was only offered in this case when it got to trial d "no case has been cited or discovered when a court has allowed waiver of an essential term at such a time." (Appellees' Brief 35) t Appellees could not really have meant that either, for it is t true. In Trotter v. Lewis, 185 Md. 528, 45 A. 2d 329 (1946), option case, the offer to waive the unenforceable term was made in en court. In Levine v. LaFayette Building Corp., 103 N.J. Eq. 121, 2 Atl. 441 (1928), the offer to waive was apparently made in the eadings. In Haire v. Patterson, 63 Wash. 2d 282, 386 P.2d 953 963), the waiver was not made until the termination of the case en the court granted specific enforcement conditioned upon the aintiff waiving his benefits under the indefinite provision. bbell v. Ward, 40 Wash. 2d 779. 246 P.2d 468 (1952), is the same this respect as Haire. Appellees also say, with respect to the eferred payment cases" that "with one possible exception, the ovisions of the contracts involved in the deferred payment cases rmitted, either expressly or by implication, the cash payment of the lance of the purchase price and the courts were not in the position having to change the terms of the agreement involved." (Appellees' ief 38) This statement simply does not give an accurate



der discussion - contain no prepayment provision. These three ses were credit sales and the courts did change the terms in 15/der to grant specific performance. Further, Appellees on the ne page state (at footnote 1) with respect to the exception they cognized, "The New Jersey rule is clear, however, that a belated iver in open court as attempted in the instant case would not be lerated. 142 Atl. at 449." The cited page says nothing of the cit.

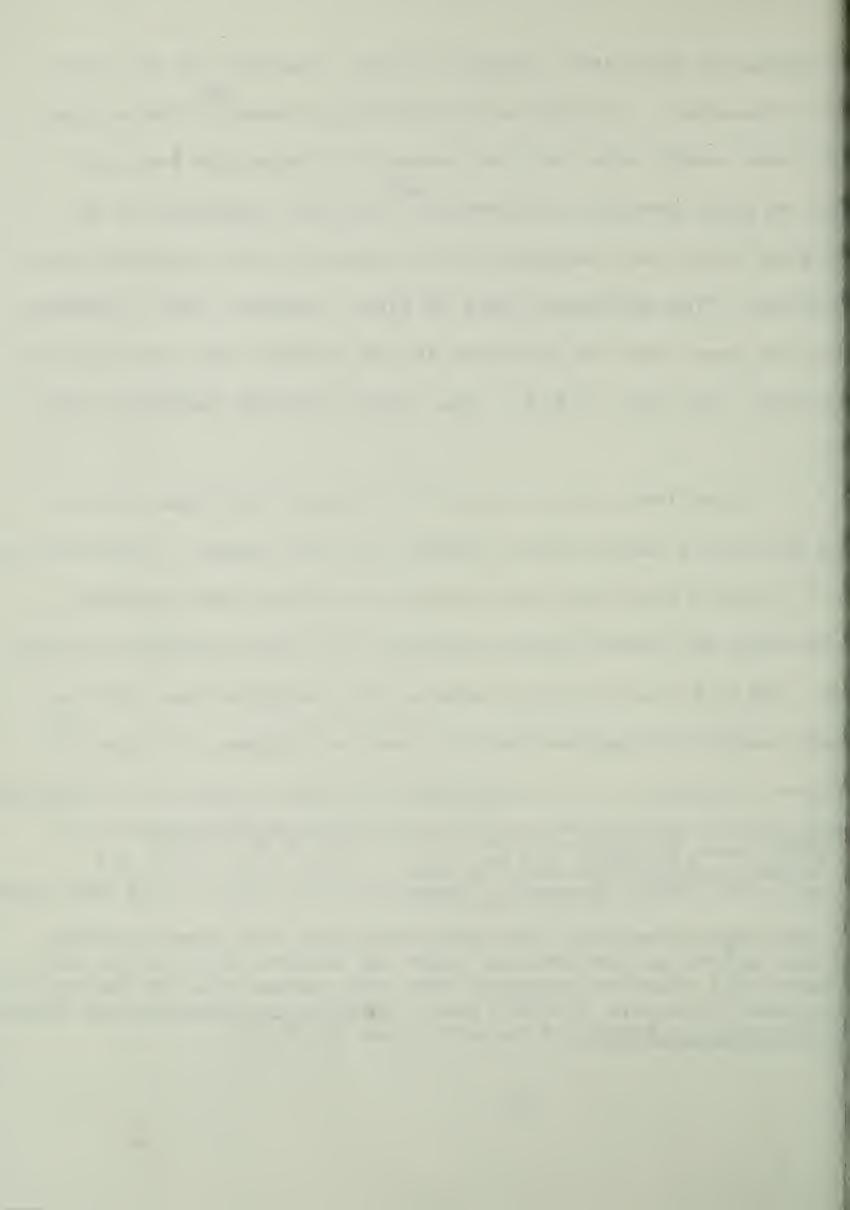
Appellees state at page 33 of their brief that if this se involved a subordination clause "with the terms... definitely set rth," and if Appellees were unable to perform, then Appellant uld waive the subordination provision and obtain specific performace. There is no difference between this supposed case and the medy sought by Appellant here in terms of outcome, in terms of irness or justice to the Appellees, in terms of justice to Appelant,

Blanton v. Williams, 209 Ga. 16, 70 S.E.2d 461 (1952);

Levine v. LaFayette Building Corp., 103 N.J. Eq. 121, 142

Atl. 441 (1928); Trotter v. Lewis, 185 Md. 528, 45 A.2d 329 (1946)

The authorities have long recognized that such cases as these the 'waiver of performance' cases do involve the specific permance of a contract different from that agreed upon by the parties. statement Contracts §359(2); Note, Specific Performance with Abatent of Purchase Price, 25 Harv. L. Rev. 731 (1912).

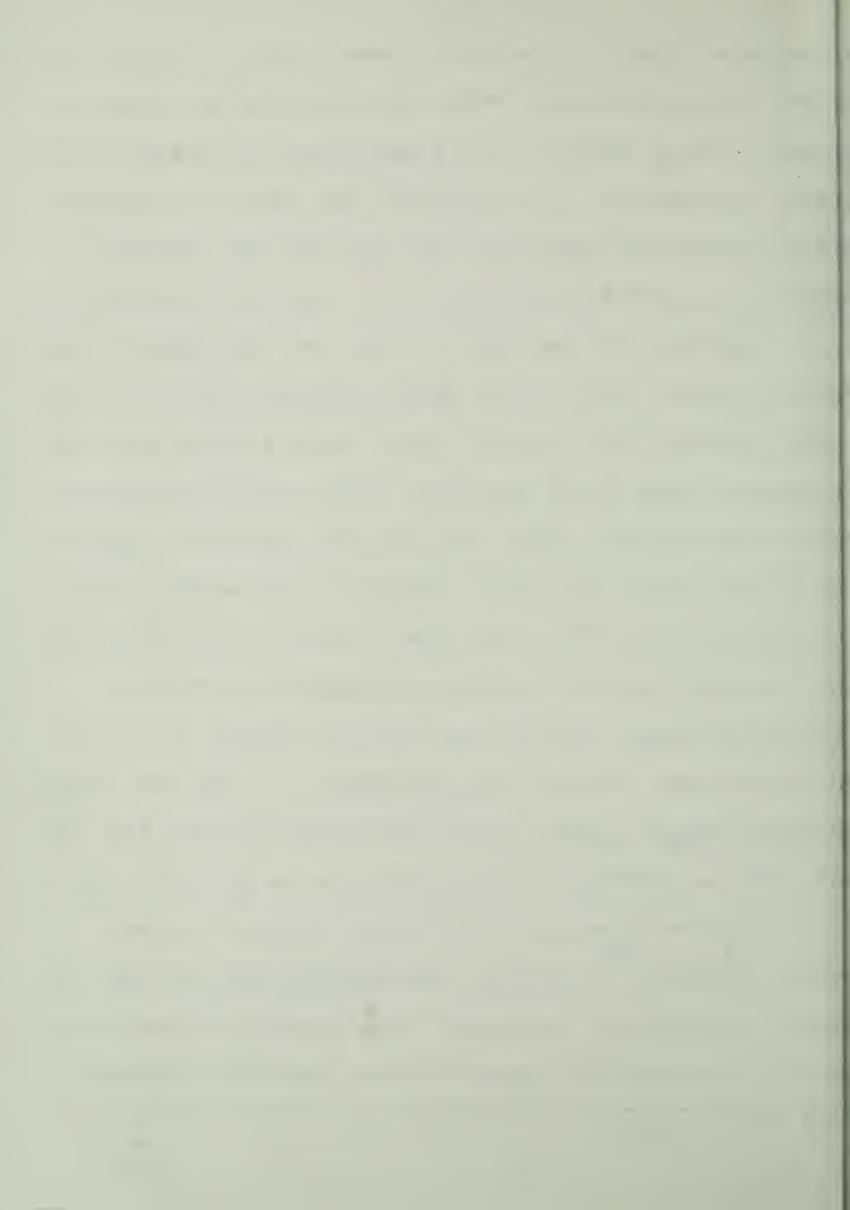


in any other terms. The only difference is that in one case the ellees cannot perform and in the other they will not; there is reason in law or logic why this should alter the outcome so far as ellant is concerned. It is submitted that there is no legally nizable difference between the two cases and that Appellees' ission is an admission that Appellant is entitled to prevail here.

Appellees cite two cases of their own with respect to the piety of waiver. One of them, Roven v. Miller, 168 Cal. Ap. 2d , 335 P.2d 391, 335 P.2d 1035 (1959), simply involved an option ch expired before it was exercised. This case has no relevance tever to the question before the court and there is no apparent son for its having been cited. Neither of the parties to this e has been able to find a case from a federal court or from the hest court of any state involving an attempted waiver of a ordination clause. Only one case could be located, and it was m the California District Court of Appeals. In this case, Magna elopment Company v. Reed, 228 Cal. App. 2d 230, 39 Cal. Rptr. 284 64), the court refused to accept the waiver on the ground that do so 'would be allowing the unilateral creation of a new, ferent contract." The court had previously held that the subination provision was indefinite. This previous holding was not soned or elaborated but rather was based upon blind adherence

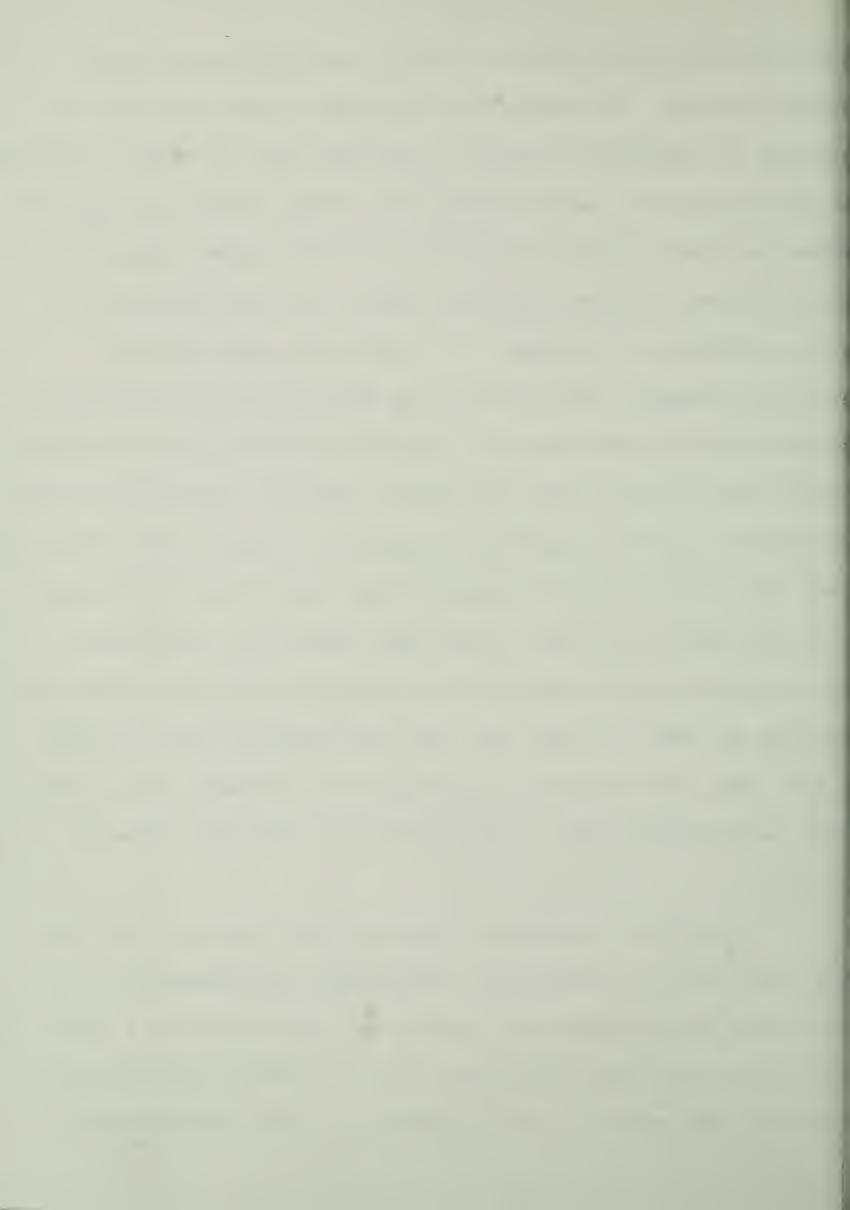
See note 15, supra.

<sup>-20-</sup>

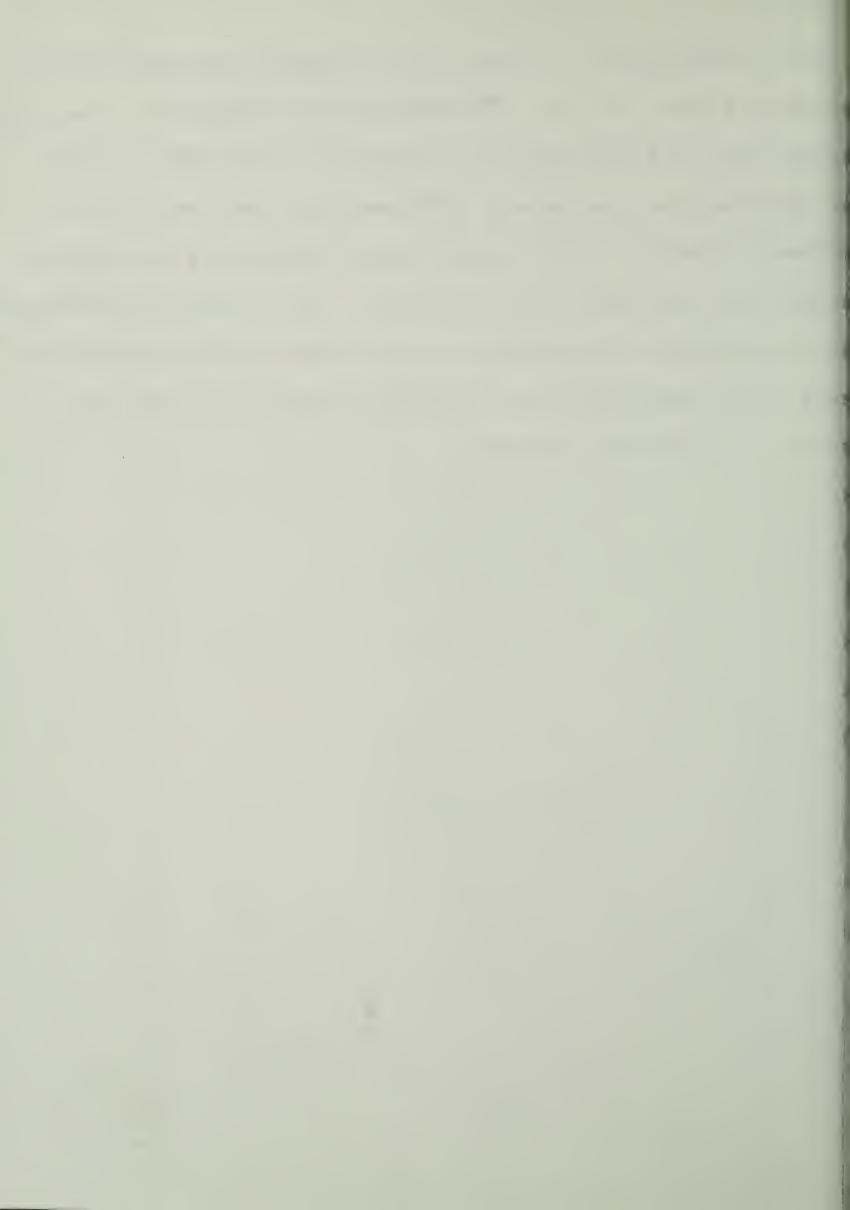


the pre-existing California District Court of Appeals cases ready discussed. The court's holding that waiver could not be rmitted was equally unreasoned. The court made no effort to explain y permitting such a waiver would make a "new, different contract". ither was there citation of any of the other waiver cases or disssion of the reason why the case before the court should be cided differently from them. It is the only case found by pellees to support them in resisting waiver of the subordination ovision in this case and it is directly contrary to the very subantial body of cases from the highest Appellate Courts of numerous risdictions cited by Appellant (Appellant's Brief 18-32). There is way that this case can be squared with them; either it is wrong, all the others are wrong. Appellant submits that the others ate a true and established rule of equity jurisprudence which has thstood the test of time, that they are inherently more logical, d that they are reasoned and reflective of the basic aims of the mmon law including that of effectuation of contracts wherever ssible.

Appellees also make an argument which seems to say that nee there were no restrictions placed upon the agreement to bordinate, the Appellant has never been bound to accept a lease wich did contain such restrictions and thus there is no mutuality remedy. The result of this apparently is that the Appellant's



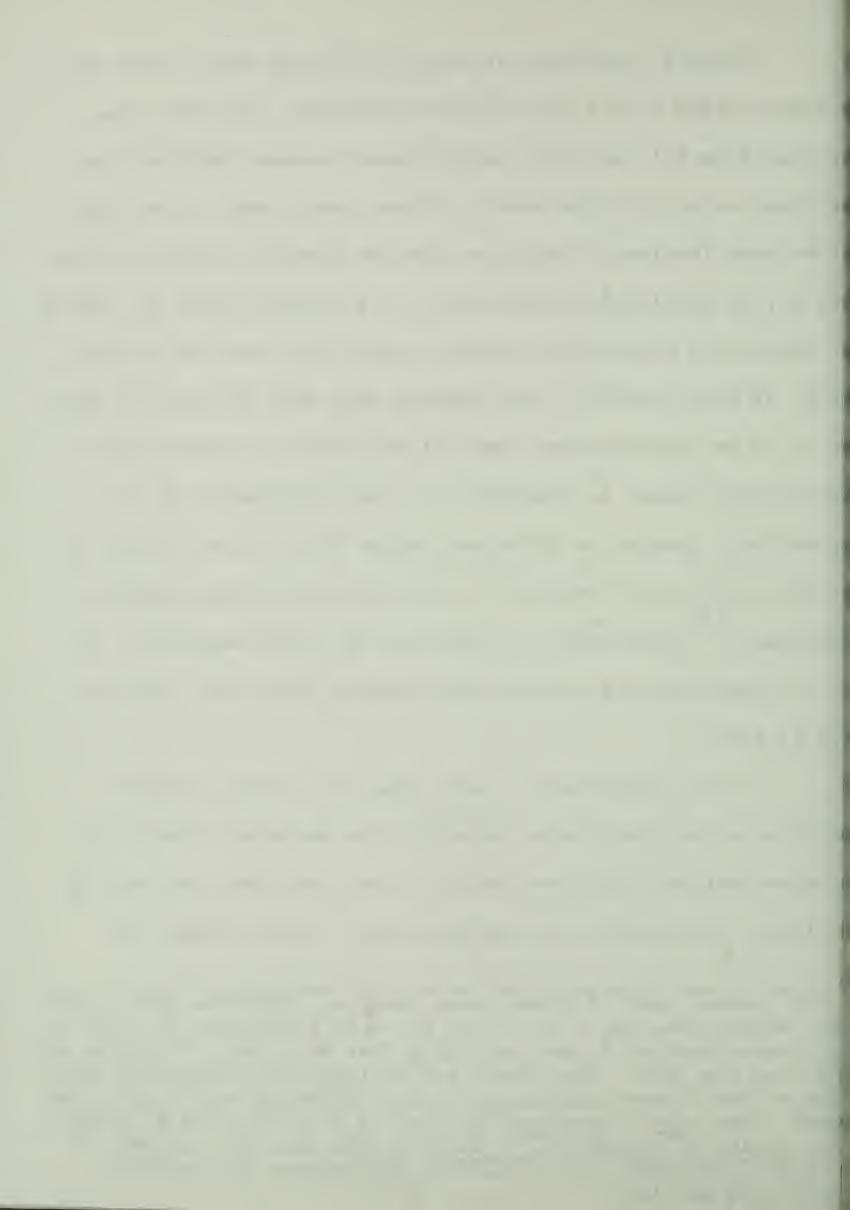
ppellee's Brief 35, 36). The meaning is not altogether clear, but rhaps this is simply another reiteration of Appellees' argument the effect that our case is different from the others because have no contract. The argument simply assumes its own validity prove the validity of its conclusion - i.e., specific performance annot be granted because there is no contract, and the proof that here is no contract is that specific performance will not be cauted. It is purely circular.



Finally, Appellees at page 36 of their Brief reach the issue raised by the lower court's decision: Is this case ferent from all the other waiver cases because they involved visions solely for the benefit of one party (who was waiving) our case involves a provision for the benefit of both parties. re is, as Appellant pointed out in its opening brief (p. 29) no h thing as a clause in a contract which can never be to the efit of both parties. The question that must be faced if this e is to be distinguished from all the others is whether the ordination clause is beneficial to the subordinator in any stantially greater or different degree than the provisions in other cases are beneficial to the party resisting specific orcement. The answer to this must be in the negative - in t, as Appellant has pointed out (Opening Brief 29), the conse is true.

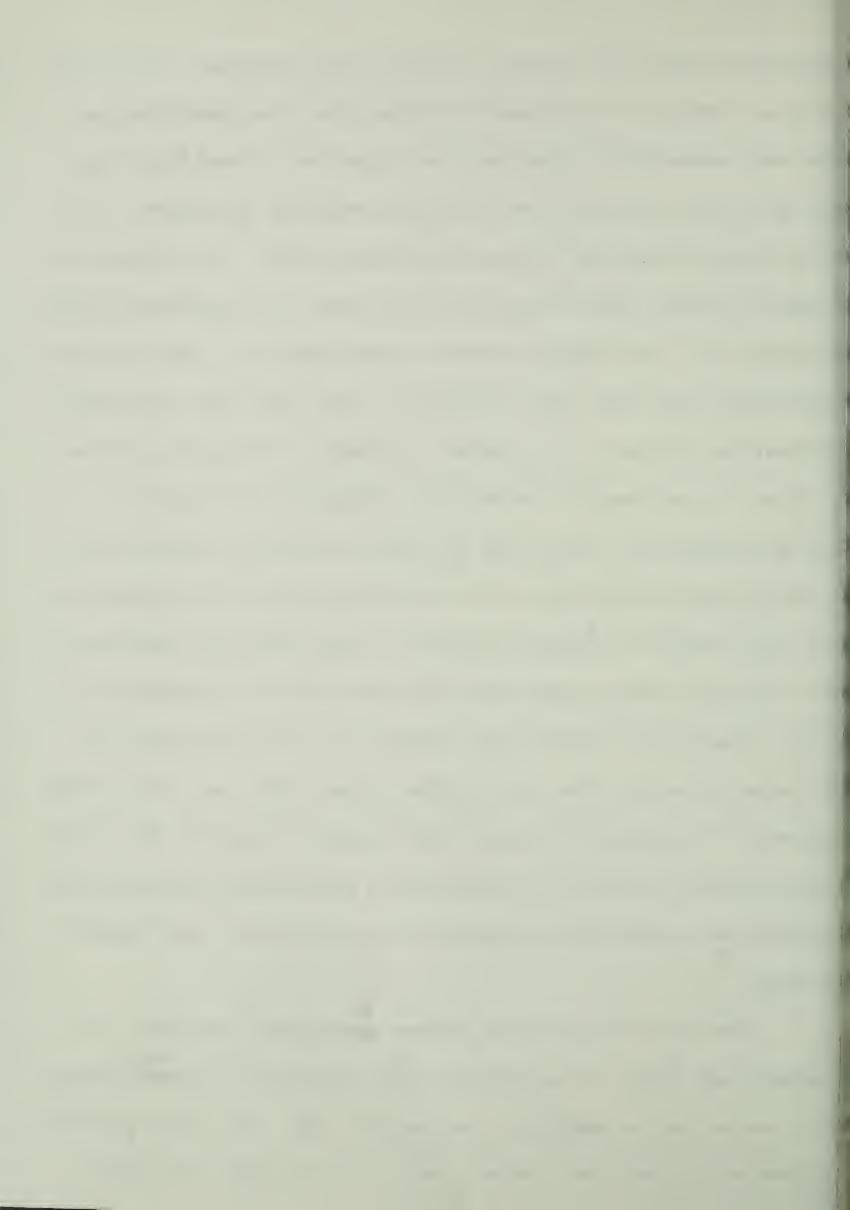
It is appropriate to note that all of the evidence ilable to the court below in making its decision showed that subordination clause was asked for and insisted upon only by ellant. For example, in the deposition of Mr. Ching, who

Of course, many of these cases involve, like this one, a sitcion whereby one party is trying to avoid a contract by refusing
perform a part of it and utilizing that as a basis for being exsed from the rest. The courts and writers have recognized this
one of the factors mitigating against allowing such a party to
ceed. See, e.g., Morris v. Ballard 16 F.2d 175, 176 (D.C.Cir.
6), Wesley N. Taylor Co. v. Russell, 194 Cal. App. 2d 816, 15
.. Rptr. 357, 365; Fry on Specific Performance of Contracts,
830 (3d ed. 1884).



Appellees state, was acting as Appellant's attorney, he stated er questioning by Appellees' attorney that the subordination use was requested by Appellant and Appellant alone, and that eed Appellant insisted the provision would be necessary if it e to obtain financing (Ching Deposition 27-28). Mr. Ching was asked whether restrictions on the degree of subordination had n agreed to. Mr. Ching answered in the negative, stating that agreement was "that this would be a full, you know, complete ordination of their fee interest, period." (Ching Deposition . Even the explanation made by Mr. Ching to the Appellees of t a subordination clause was all about during the negotiations candidly and forthrightly to the effect that such a clause was to the benefit of lessors and all to the potential detriment the lessees. (Ching Deposition 32; See also Low Deposition 10, 12). There is no indication anywhere in the depositions or er material before the court below (other than the self-serving tements of Appellees on their interrogatory answers) that there any intention that the subordination provisions should benefit Appellees or that they expected or bargained for any benefit refrom.

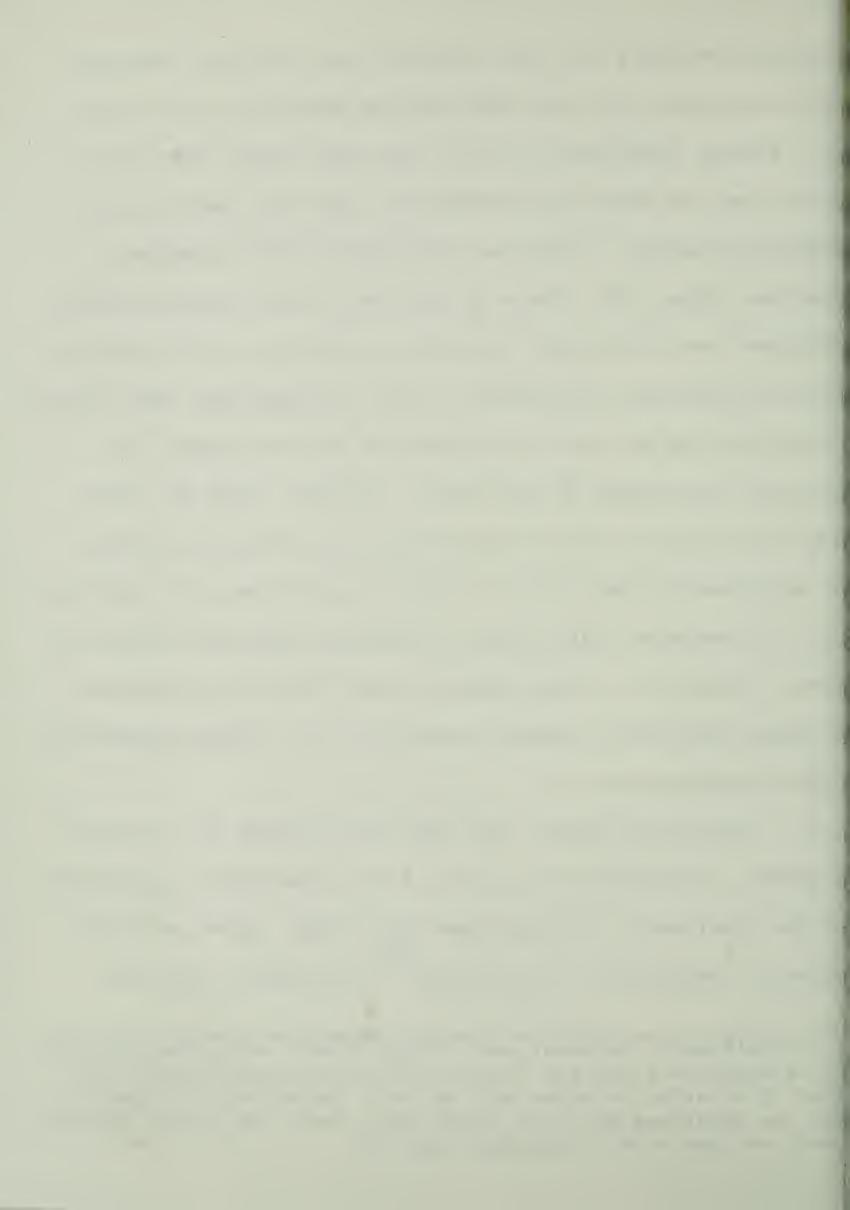
How then do Appellees answer Appellant's analysis of nature and effect of a subordination provision and conclusion tit could not be mutually beneficial? They cite no authority; y give no analysis and indeed, even fail to take issue with



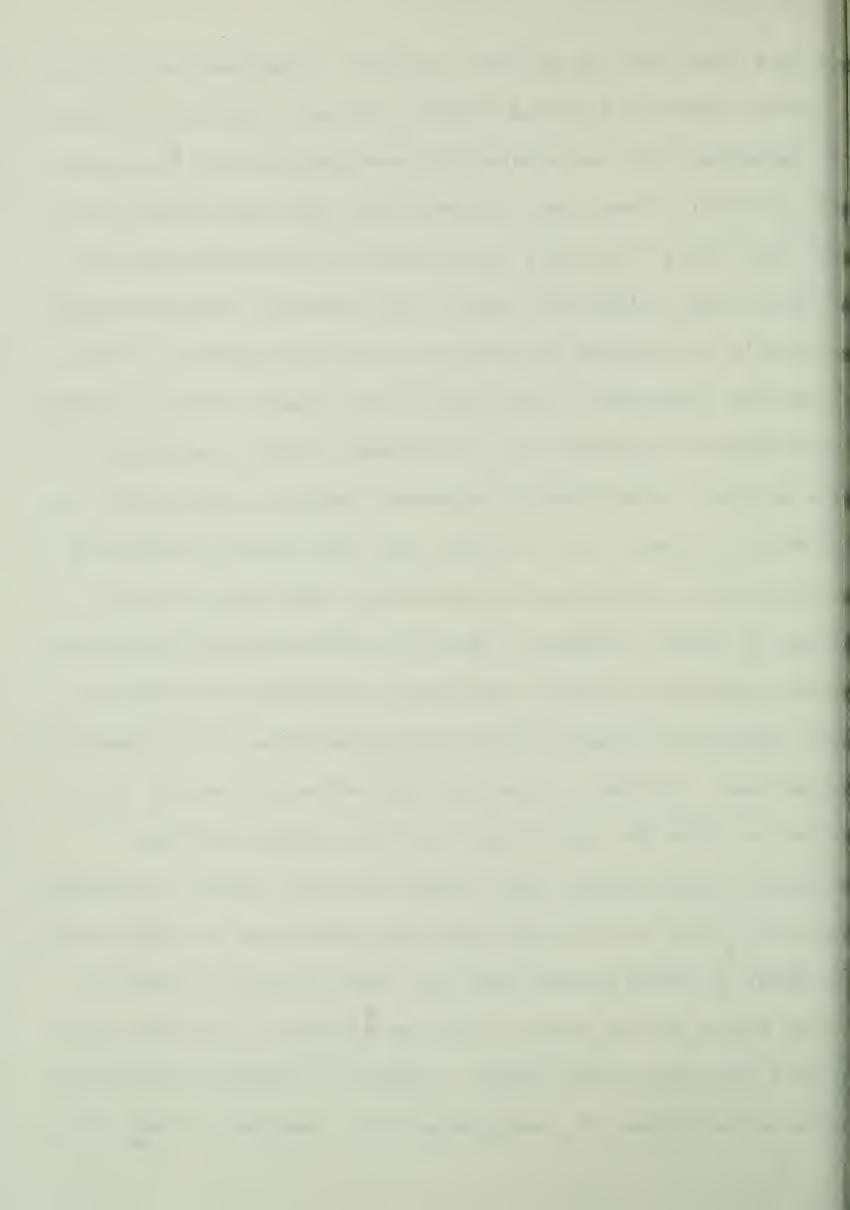
mitted involved a far more plausible and realistic "benefit" the resisting party than anything the Appellees could assert e. Indeed, Appellees do little more than assert that "it is vious that the Appellees contemplated that they would receive enefit by having a completed structure on their premises...." pellees' Brief 37). There is not even a hint why this should 'bbvious" even though all available evidence is to the contrary. ther is there any explanation of why, if Appellees were primariinterested in the type of building to be constructed, that ter was not covered in the option. Further, both Mr. Ching Mr. Low state in their depositions that although buildings e mentioned by the parties in their negotiations, the Appellees ight to impose no restrictions or minimum requirement upon the sees. Rather, Mr. Ching reported that "from the discussions, lessee would have complete control of it". (Ching deposition See Low deposition 15).

Appellees suggest that Appellant offered in its brief effect, to negotiate the terms of the subordination provision the happellees...." (Appellees' Brief 38). Appellant never 18/
fered to "negotiate" in its brief; its position was made

Appellant's statement was: "If Appellees wish, the Appellant II be happy to alter its offer to waive the subordination prosion by offering to waive only so much thereof as Appellees dece; the Appellees may then subordinate their fee simple interest much as they wish." (Opening Brief 31).



rfectly clear and has not been refuted. Appellees have refused perform their obligations under a contract, the terms of which ce bargained for, and substantial consideration for which was id. (R. 8-9). They then utilized their own unwillingness as a sis for asking this court to excuse them from performance of I their other obligations under that contract, notwithstanding pellant's willingness to perform fully and completely all its ligations thereunder. Appellees in one breath refuse to execute subordination agreement and in the next refuse to execute a se without a subordination agreement because subordination is neficial to them. If it is true that some benefit accrues to pellees from a subordination provision, then Appellant is lling to accept a degree of specific enforcement of the option enting Appellant a lease containing a subordination provision ich contains only such subordination provisions as are beneficial Appellees - in short, Appellant will waive all benefit it is receive under the said clause but will permit Appellees to tain all benefit which they alleged they will receive thereunder. rely the offer of waiver in this form eliminates any distinction at might be drawn between this case and the myriad others inlving waiver on the ground this case involves a provision with nefits accruing to both sides; further, it properly places upon pellees the burden of showing what this "benefit" is that they



not wish to give up. 19/

III. The third issue is whether Appellant, if not entitled specific performance, is not then entitled to damages arising of Appellees' refusal to perform. Appellant believes Appellees' ef fails to meet the discussion and authorities given in its ning brief and will therefor make no further reply here.

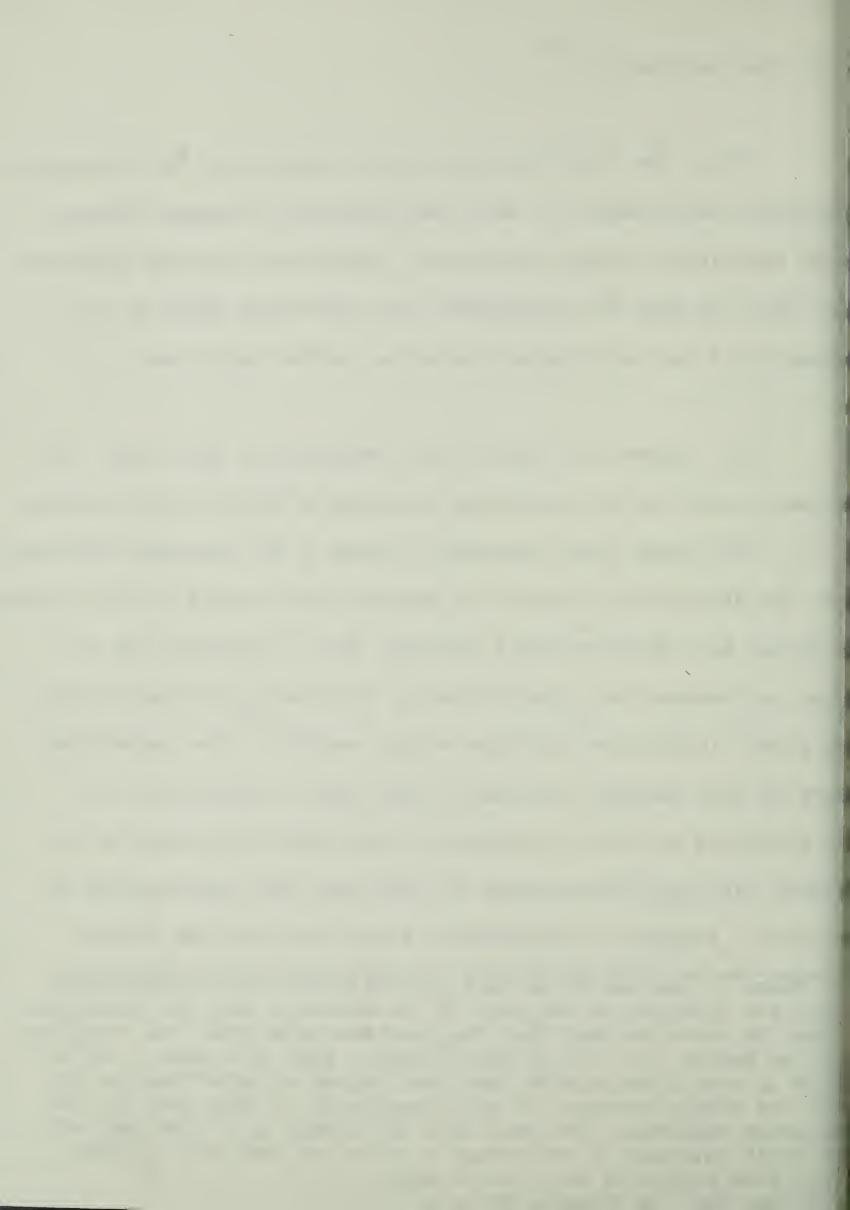
IV. There is a final issue presented in this case: Did lower court err in cancelling Appellant's Motion of Lis Pendens?

The lower court apparently shares a not uncommon confusion to the distinction between lis pendens and a notice of lis pendens. former is a doctrine which provides that a purchaser who access an interest in property that is involved in pending litigates a stands in the same position as his vendor. The underlying bry of this ancient doctrine is that once a controversy has a subjected to the jurisdiction of the courts it should be imsible for any of the parties to interfere with consummation of

courts' judgment. The doctrine itself has not been altered

There is and can be no real question that the subordination use was intended to and does in fact benefit only the Appellant. must be borne in mind that the question is whether the Appellees ld be better off with no subordination than with some - and the den is upon them to show that some degree of subordination of ir fee simple interest is more beneficial to them than no subination whatever. The mere fact that there is a risk they will e their interest in the former case and no such risk in the ter case precludes any such showing.

34 Am. Jur. Lis Pendens Sec. 2.



statute in Hawaii.

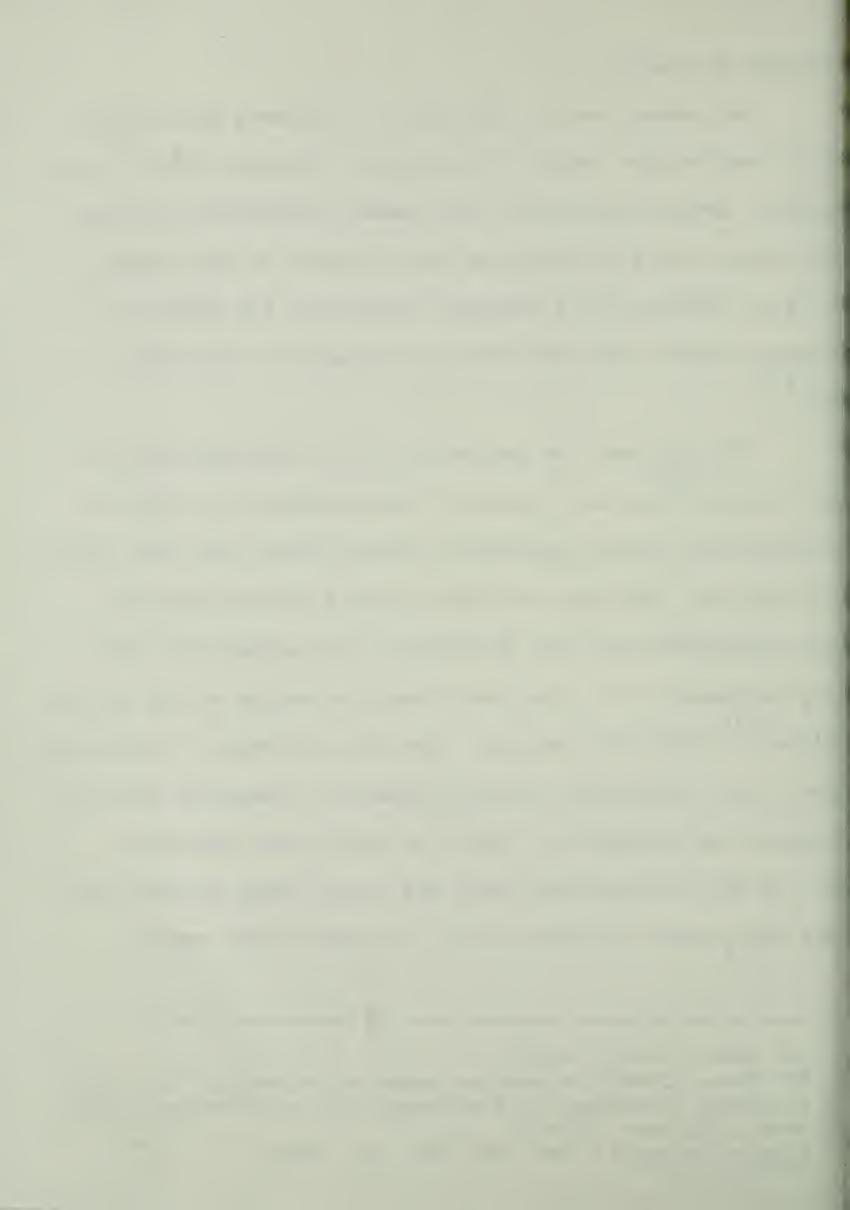
At common law all purchasers of property were deemed have constructive notice of litigation affecting title to such perty. Hawaii has altered this common law rule for actions the state courts by requiring that a notice of such litigan (i.e., Notice of Lis Pendens) be filed in the Bureau of veyances and/or with the Assistant Registrar of the Land 21/rt.

If Appellees are correct in their conclusion that the \$\frac{22}{2}\$ aii statute does not "require" the recording of a notice of Pendens for actions pending in Federal Courts, and that there-28 USC Sec. 1964 does not apply to this action, they have ely established that the doctrine of lis pendens will apply any purchaser of the land even though no notice of lis pendens \$\frac{23}{2}\$ filed. If this is the case, then the existence of Appellant's ice of Lis Pendens was an irrelevance; it created no obstacle anyone and provided in itself no cloud upon Appellees' and. In this circumstance there was no one whose interest had may have become affected by the existence of the notice,

King v. Davis, 137 Fed. 222 (Va. Cir. 1905).

RLH Secs. 230-42, 342-78.

RLH Secs. 230-42; no mention seems to be made of the compare statutory provision for land under the jurisdiction of the d Court, RLH Secs. 342-78.

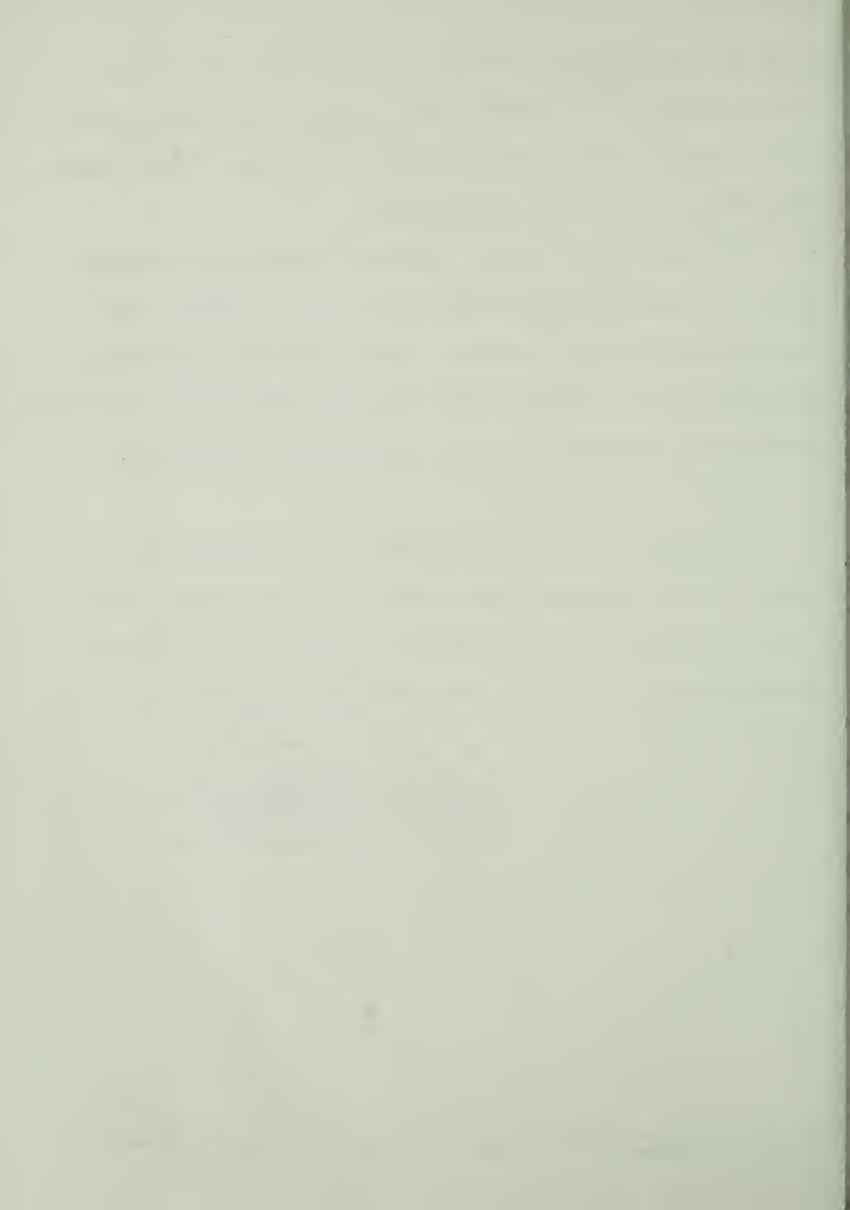


ertion of right". In short, the district court had no juristion to cancel the lis pendens since it could not do so within framework of a "case or controversy".

If, on the other hand, Appellees' conclusion is incortant and if a notice of lis pendens is required in Hawaii for ions in Federal as well as State courts, then the reasoning authorities given in Appellant's opening brief stand unanswered Appellees and establish that the cancellation was in error.

I certify that, in connection with the preparation of s brief, I have examined Rules 18 and 19 of the United States art of Appeals for the Ninth Circuit, and that, in my opinion, foregoing brief is in full complicate with the rules.

Attorney for the pellant



## UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LAHAINA-MAUI CORPORATION, California corporation,

Appellant,

V.

5.

No. 20419

CEPH TAU TET HEW and HELEN CONA HEW, husband and wife, ORGE TAN and SHIZUKO RUTH I, husband and wife,

Appellees.

## CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of December, 1965, aused to be mailed (First Class Mail) in the U. S. Post ice at Honolulu, Hawaii, postage thereon fully prepaid, three ies of the foregoing brief of the above named Appellant, THE AINA-MAUI CORPORATION, addressed to Mr. William M. Swope, Smith, d, Beebe & Cades, First National Bank Building, Honolulu, Hawaii.

DATED at Honolulu, Hawaii, this 29th May of December,

RICHARD P. SCHULZE

